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Nos. 83-141, 83-236, and 83-283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, *et al.*,
Appellants,
v.
FRANK E. MIDKIFF, *et al.*,
Appellees.

PORTLOCK COMMUNITY ASSOCIATION, *et al.*,
Appellants,
v.
FRANK E. MIDKIFF, *et al.*,
Appellees.

KAHALA COMMUNITY ASSOCIATION, INC., *et al.*,
Appellants,
v.
FRANK E. MIDKIFF, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the courts below did not correctly assume jurisdiction over the constitutional questions presented where:

(a) under the *Pullman* doctrine (i) no party had raised this doctrine in the Court of Appeals; and (ii) the state eminent domain statute at issue clearly stated that any exercise of the state's eminent domain authority "is for a public use and purpose," thus leaving no room for ambiguity or a different state court interpretation; and

(b) under the *Younger* doctrine (i) the state never claimed at any time throughout the proceedings in both lower courts that *Younger* was applicable and, to the contrary, affirmatively sought a federal judicial decision on the merits; (ii) private parties cannot assert *Younger* abstention; and (iii) there were no pending state court proceedings either at the time this suit was brought or at the time the federal District Court issued a temporary restraining order and later a partial preliminary injunction against the enforcement of the challenged state law.*

2. Whether a state statute providing for a taking by eminent domain of the fee simple title of lessors' lots for the immediate transfer of the title to lessees violates the "public use" requirement of the Fifth and Fourteenth Amendments to the Constitution of the United States, where that taking (a) can be performed only at the behest of the individual lessees already owning homes situate upon the lots; (b) applies only to the specific lots for which the lessees have applied and for which the lessees themselves pay the amount awarded upon condemnation;

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* In our Motions to Affirm, appellees identified two additional subsections—one concerning the *Burford*, and the other concerning the *Colorado River*, abstention doctrines. Because appellants have not contended in their briefs on the merits that either doctrine is applicable, appellees have omitted these subsections.

(c) does not change the use, usability, possession, or occupancy of the lots taken, or their environs, but instead simply transfers title to the applicant lessees; (d) involves the state only as the conduit for the transfer of title; and (e) does not establish any restriction of any kind upon the lessees' right to impose restraints upon the further alienation of those lots once the lessees have obtained titled.

3. Whether the state statute described in Question 2 violates the Due Process Clause of the Fourteenth Amendment by impermissibily delegating to private parties the right to exercise the sovereign power of eminent domain.

4. Whether the state statute described in Question 2 violates the Due Process Clause of the Fourteenth Amendment by failing to have as a sustaining legislative purpose anything other than a bare desire to harm a politically unpopular group of landowners within the state.

5. Whether the state statute described in Question 2 violates the Contract Clause of Article I, § 10, of the Constitution as applied to leases executed prior to its initial enactment.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	(i)
TABLE OF AUTHORITIES	v
STATEMENT	2
I. THE NATURE OF THE CASE	2
II. TRUSTEES AND THE AFFECTED LEASEHOLDS	3
A. Trustees and the Schools	3
B. The Leasehold System in Hawaii	5
III. THE STATUTE	7
IV. THE COURSE OF THE PROCEEDINGS	13
A. Background	13
B. The Proceedings Below	15
C. State Court Proceedings	19
SUMMARY OF ARGUMENT	22
ARGUMENT	25
I. THE COURT OF APPEALS CORRECTLY RULED THAT ABSTENTION WOULD HAVE BEEN IMPROPER	25
A. *Pullman* Abstention Is Inappropriate Because It Has Been Waived, and the Federal Constitutional Questions Are Clearly and Unavoidably Presented	25
B. *Younger* Has Been Waived and in Any Event Does Not Require Abstention	30
II. THE COURT OF APPEALS CORRECTLY RULED THAT CHAPTER 516 VIOLATED THE PUBLIC USE REQUIREMENT OF THE EMINENT DOMAIN CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS	38

TABLE OF CONTENTS—Continued

Page

A. Introduction 38

B. The Public Use Requirement Forbids the State from Transfering Property from One Private Party to Another for the Exclusive Use and Benefit of the Latter 42

C. Chapter 516 Is an Unprecedented Attempt to Use Eminent Domain for Wholly Private Purposes 52

D. The Question of Whether Chapter 516 Serves a Public Use Cannot Be Answered Simply by Asking Whether the Act Is a Valid Police Power Regulation 76

III. CHAPTER 516 VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT 82

A. Chapter 516 Authorizes the Condemnation of Trustees' Property for the Purely Private Gain of the Lessees 82

B. Chapter 516 Impermissibly Delegates State Eminent Domain Authority to Financially-Self-Interested Private Parties 83

IV. CHAPTER 516 VIOLATES THE CONTRACT CLAUSE OF THE CONSTITUTION 85

CONCLUSION 89

TABLE OF AUTHORITIES

Page

Ahrensfeld v. *Stephens*, 528 F.2d 193 (7th Cir. 1975) 31, 34
Albright v. *Sussex County Lake & Park Commission*, 71 N.J.L. 303, 57 A. 398 (1904) 50
Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978) 86, 87, 88
Almeida-Sanchez v. *United States*, 413 U.S. 266 (1973) 66
Aloha Airlines, Inc. v. *Director of Taxation*, 104 S.Ct. 291 (1983) 68
Anderson v. *Smith-Powers Logging Co.*, 71 Or. 276, 139 P. 736 (1914) 51
Andrus v. *Allard*, 444 U.S. 51 (1979) 48, 61
Arkansas State Highway Comm'n v. *Alcott*, 260 Ark. 225, 539 S.W.2d 432 (1976) 51, 65
Armstrong v. *United States*, 364 U.S. 40 (1960) ..40, 48, 81
Atherton v. *Fowler*, 96 U.S. 513 (1878) 70
Babbit v. *United Farm Workers Nat'l Union*, 442 U.S. 289 (1979) 26
Baggett v. *Bullitt*, 377 U.S. 360 (1964) 28
Bassett v. *Swenson*, 51 Idaho 256, 5 P.2d 722 (1931) 64
Baycol, Inc. v. *Downtown Development Authority of Fort Lauderdale*, 315 So.2d 451 (Fla. 1975) 50
Berman v. *Parker*, 348 U.S. 26 (1945) ..... *passim*
Bibb v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) 80
Bishop v. *Wood*, 426 U.S. 341 (1976) 35
Block v. *Hirsch*, 256 U.S. 135 (1921) 47, 63
Bloodgood v. *Mohawk & H.R.R.*, 18 Wend. 9 (N.Y. Ct. Corr. of Err. 1837) 50, 70
Boyd v. *Ritter Lumber Co.*, 119 Va. 348, 89 S.E. 273 (1916) 50, 64
Brown v. *Fogel*, 387 F.2d 692 (4th Cir. 1967), *cert. denied*, 390 U.S. 1045 (1968) 34
Brown v. *United States*, 263 U.S. 78 (1923) 47, 54
Burford v. *Sun Oil Co.*, 319 U.S. 315 (1943) 18
Calder v. *Bull*, 3 U.S. (3 Dall.) 386 (1798) 46
Califano v. *Goldfarb*, 430 U.S. 199 (1977) 68

TABLE OF AUTHORITIES—Continued

Page

Chicago, Burlington & Quincy R.R. Co. v. *Chicago*, 166 U.S. 226 (1897) 39, 48
Cincinnati v. *Louisville & Nashville Railroad Co.*, 223 U.S. 390 (1912) 86
Cincinnati v. *Vester*, 281 U.S. 439 (1930) 47, 63, 65, 66
City and County of San Francisco v. *Ross*, 44 Cal. 2d 52, 279 P.2d 529 (1955) 51
City of Atlanta v. *Atlanta Gas Light Co.*, 144 Ga. App. 157, 240 S.E.2d 730 (1977) 50
City of Arlington v. *Bardin*, 478 S.W.2d 182 (Tex. 1972) 65
City of East Lake v. *Forrest City Enterprises, Inc.*, 426 U.S. 668 (1976) 83
City of Gary v. *Much*, 94 N.E. 583 (Ind. 1911) 50, 64
City of Little Rock v. *Raines*, 241 Ark. 1071, 411 S.W.2d 486 (1967) 51, 64
City of Owensboro v. *McCormick*, 581 S.W.2d 3 (Ky. 1978) 50, 64
City of Seattle v. *Loutsis Investment Co., Inc.*, 16 Wash.App. 158, 554 P.2d 379 (1976) 65
Clark v. *Nash*, 198 U.S. 361 (1905) 47, 55, 57
Cloth v. *Chicago R.I. & P. Ry. Co.*, 97 Ark. 86, 132 S.W. 1005 (1910) 64
Cole v. *LeGrange*, 113 U.S. 1 (1885) 47
Colorado River Water Cons. Dist. v. *United States*, 424 U.S. 800 (1976) 19, 25
Connally v. *Georgia*, 429 U.S. 245 (1977) (*per curiam*) 84
Connecticut College for Women v. *Calvert*, 87 Conn. 421, 88 A. 633 (1913) 50
Contributors to Pennsylvania Hospital v. *Philadelphia*, 245 U.S. 20 (1917) 86
Cooper v. *Aaron*, 358 U.S. 1 (1958) 67
Cordova v. *City of Tucson*, 16 Ariz. App. 447, 494 P.2d 52 (1972) 65
County of Alleghany v. *Frank Mashuda Co.*, 360 U.S. 185 (1959) 25
Cozad v. *Kanawha Hardwood Co.*, 139 N.C. 283, 51 S.E. 932 (1905) 50

TABLE OF AUTHORITIES—Continued

	Page
Davis v. *Financial Realty*, No. 4735	14
Doran v. *Salem Inn, Inc.*, 422 U.S. 922 (1975)	37
Duck River Elec. Membership Corp. v. *City of Manchester*, 529 S.W.2d 202 (Tenn. 1975)	65
Earth Management, Inc. v. *Heard County*, 248 Ga. 442, 283 S.E.2d 455 (1981)	51
Edens v. *City of Columbia*, 228 S.E. 563, 91 S.E.2d 280 (1956)	51, 64
Edgar v. *Mite Corp.*, 457 U.S. 624 (1982)	80
Energy Reserves Group, Inc. v. *Kansas Power & Light Co.*, 103 S.Ct. 697 (1983)	87
Engle v. *Isaac*, 456 U.S. 107 (1982)	32, 33
Enmund v. *Florida*, 458 U.S. 782 (1982)	66
Estelle v. *Smith*, 451 U.S. 454 (1981)	33
Eubank v. *City of Richmond*, 226 U.S. 137 (1912)	83, 84
Examining Board v. *Flores de Otero*, 426 U.S. 572 (1976)	29
Exxon Corp. v. *Eagerton*, 103 S.Ct. 2296 (1983)	87
Exxon Corp. v. *Maryland*, 437 U.S. 117 (1978)	73
Fair Assessment in Real Estate Ass'n v. *McNary*, 454 U.S. 100 (1981)	35, 36
Falkner v. *Northern States Power Co.*, 75 Wis.2d 116, 248 N.W.2d 885 (1977)	65
Fallbrook Irrigation District v. *Bradley*, 164 U.S. 112 (1896)	*passim*
Fay v. *Noia*, 372 U.S. 391 (1963)	31
Fifth Avenue Coach Lines, Inc. v. *City of New York*, 11 N.Y.2d 342, 183 N.E.2d 684 (1962)	65
Flook v. *Hunting*, 76 Md. 178, 24 A. 670 (1892)	88
Fuentes v. *Shevin*, 407 U.S. 61 (1972)	36
Gardner v. *Village of Newburgh*, 2 Johns Ch. 162 (N.Y. 1816)	51
Gauley & S.R. Co. v. *Vencill*, 73 W.Va. 650, 80 S.E. 1103 (1914)	64
Gauthier v. *Morrison*, 232 U.S. 452 (1914)	70
Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824)	40
Gibson v. *Berryhill*, 411 U.S. 564 (1973)	36, 84
Gohld Realty Co. v. *City of Hartford*, 141 Conn. 135, 104 A.2d 365 (1954)	64

TABLE OF AUTHORITIES—Continued

	Page
Gravelly Ford Canal Co. v. *Pope & Talbot Land Co.*, 36 Cal.App. 556, 178 P. 150 (1918)	51
Gray v. *City of High Point*, 203 N.C. 756, 166 S.E. 911 (1932)	49
Griswold v. *Connecticut*, 381 U.S. 479 (1965)	66
Hairston v. *Danville & Western Ry. Co.*, 208 U.S. 598 (1908)	47, 52, 57, 63
Harman v. *Forssenius*, 380 U.S. 528 (1965)	26, 28
Harrison v. *NAACP*, 360 U.S. 167 (1959)	30
Hawaii Housing Authority v. *Brown*, No. 8489 (Haw. Nov. 10, 1982)	21
Hawaii Housing Authority v. *Castle*, 65 Haw. Adv. 465, 653 P.2d 781 (1982)	21
Hawaii Housing Authority v. *Midkiff*, Civ. No. 60465 (Haw. Cir. Ct.)	10
Hawaii Housing Authority v. *Midkiff*, Civ. No. 63408 (Haw. Cir. Ct. Sept. 6, 1983)	21, 29
Hawaii Housing Authority v. *Midkiff*, Civ. Nos. 59191, 59201, & 59202 (Haw. Cir. Ct.)	21
Hawaii Housing Authority v. *Midkiff*, No. A-113 (1983) (Rehnquist, J., in chambers)	22
Hawaii Housing Authority v. *Midkiff*, No. A-278 (1983) (Rehnquist, J., in chambers)	22
Hawkins v. *Barney's Lessee*, 30 U.S. (5 Pet.) 457 (1831)	69
Hays v. *Port of Seattle*, 251 U.S. 233 (1920)	86
Head v. *Amoskeag Mfg. Co.*, 113 U.S. 9 (1885)	56
Healy Lumber Co. v. *Morris*, 333 Wash. 790, 74 P. 681 (1903)	64
Hicks v. *Miranda*, 422 U.S. 332 (1975)	37, 38
Hines v. *City of Rocky Mount*, 162 N.C. 409, 78 S.E. 510 (1913)	49
Hogue v. *Port of Seattle*, 54 Wash.2d 799, 341 P.2d 171 (1959)	64
Home Building & Loan Ass'n v. *Blaisdell*, 290 U.S. 398 (1934)	87
Hopkins v. *Jarvis*, 648 F.2d 981 (5th Cir. 1981)	34
Hostetter v. *Idlewild Bon Voyage Liquor Co.*, 377 U.S. 324 (1964)	28
Howard Mills Co. v. *Schwartz Lumber & Coal Co.*, 77 Kans. 599, 95 P. 559 (1908)	51

TABLE OF AUTHORITIES—Continued

	Page
In re Application of Eureka Basin Warehouse and Mfg. Co., 96 N.Y. 42 (1884)	51
In re City of Seattle, 96 Wash.2d 616, 638 P.2d 549 (1981)	51, 64
In re Coleman Highlands, 401 S.W.2d 358 (Mo. 1966)	65
In re Deansville Cemetery Ass'n, 66 N.Y. 569 (1876)	51
In re Niagara Falls & W. Ry. Co., 108 N.Y. 375, 15 N.E. 429 (1888)	51
In re Opinion of the Justices, 204 Mass. 607, 91 N.E. 405 (1910)	50
In re Opinion of the Justices, 332 Mass. 769, 126 N.E.2d 795 (1955)	51
In re Puget Sound Power & Light Co., 28 Wash. App. 615, 625 P.2d 723 (1981)	65
In re Split Rock Cable-Road Co., 128 N.Y. 408, 28 N.E. 506 (1891)	51
Jenkins v. *Anderson*, 447 U.S. 231 (1980)	33
Johnson v. Robinson, 415 U.S. 361 (1974)	37
Johnson v. Zerbst, 304 U.S. 458 (1938)	31
Kaiser Aetna v. *United States*, 444 U.S. 164 (1979)	81
Kaiser Steel Corp. v. *W.S. Ranch Co.*, 391 U.S. 593 (1968)	27
Karesh v. *City Council of Charleston*, 271 S.C. 339, 247 S.E.2d 342 (1978)	51, 64
Kassel v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981)	80
Kimball Laundry Co. v. *United States*, 338 U.S. 1 (1949)	49, 82
Kolender v. *Lawson*, 103 S.Ct. 1856 (1983)	30
Komposh v. *Powers*, 75 Mont. 493, 244 P. 298 (1926), *aff'd*, 275 U.S. 504 (1927)	64
Kusper v. *Pontikes*, 414 U.S. 51 (1973)	25
Lamb v. *Jernigan*, 683 F.2d 1332 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 1276 (1983)	34
Landmark Communications, Inc. v. *Virginia*, 435 U.S. 829 (1977)	66
Larson v. *Valente*, 456 U.S. 228 (1982)	66

TABLE OF AUTHORITIES—Continued

Page

Loan Ass'n v. *Topeka*, 87 U.S. (20 Wall.) 655 (1875) 47
Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982) 83
Long Island Water Supply Co. v. *Brooklyn*, 166 U.S. 685 (1897) 86
Loretto v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) 66, 67, 81
Lynch v. *Household Finance Corp.*, 405 U.S. 538 (1972) 48
Madisonville Traction Co. v. *St. Bernard Mining Co.*, 196 U.S. 239 (1905) 19, 46, 63, 68
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 39
Marburg v. *Mercantile Bldg. Co.*, 154 Md. 438, 140 A. 836 (1928) 69, 88
Mathews v. *Diaz*, 426 U.S. 67 (1976) 34
Mathews v. *Lucas*, 427 U.S. 495 (1976) 68
McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 39
McFarland v. *American Sugar Refining Co.*, 241 U.S. 79 (1916) 74
McNeese v. *Board of Education*, 373 U.S. 668 (1963) 25
Memphis Freight Co. v. *Mayor & Alderman of Memphis*, 4 Coldwell 4 (Tenn. 1867) 51
Middlesex County Ethics Comm. v. *Garden State Bar Ass'n*, 457 U.S. 423 (1982) 36
Midkiff v. *Amemiya*, Civ. No. 47103 (Haw. Cir. Ct.), No. 7294 (Haw. Sup. Ct.) 20
Midkiff v. *Hasegawa*, No. 4727 (Haw. Sup. Ct.) 14
Midkiff v. *McCormack*, No. 4728 (Haw. Sup. Ct.) 14
Milheim v. *Moffat Tunnel Improvement District*, 262 U.S. 710 (1923) ..... *passim*
Mills v. *St. Clair*, 49 U.S. (8 Haw.) 569 (1850) 47
Minnesota Canal & Power Co. v. *Koochiching Co.*, 97 Minn. 429, 107 N.W. 405 (1906) 64
Miro v. *Superior Court for County of San Bernardino*, 5 Cal.App.3d 87, 84 Cal.Rptr. 874 (1970) 65

TABLE OF AUTHORITIES—Continued

Page

Mississippi University for Women v. *Hogan*, 458 U.S. 718 (1982) 68
Missouri Pacific R.R. Co. v. *Nebraska*, 164 U.S. 403 (1896) 46, 63, 64
Mitchum v. *Foster*, 407 U.S. 225 (1972) 25
Monongahela Navigation Co. v. *United States*, 148 U.S. 312 (1893) ..... *passim*
Monroe v. *Pape*, 365 U.S. 167 (1961) 25
Moore v. *City of East Cleveland*, 431 U.S. 494 (1977) 66, 78, 82
Mt. Vernon-Woodberry Cotton Duck Co. v. *Alabama Interstate Power Co.*, 240 U.S. 30 (1916) .. 52, 56, 57
National League of Cities v. *Usery*, 426 U.S. 833 (1976) 66
Nectow v. *City of Cambridge*, 277 U.S. 183 (1928) 78, 83
Neitzel v. *Spokane International Ry. Co.*, 65 Wash. 100, 117 P. 864 (1911) 51
New Motor Vehicle Bd. v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978) 26
Nixon v. *Fitzgerald*, 457 U.S. 731 (1982) 69
North Carolina State Highway Commission v. *Asheville School, Inc.*, 5 N.C. 684, 169 S.E.2d 193 (1969), *aff'd*, 276 N.C. 556, 173 S.E.2d 909 (1970) 65
Ohio Bureau of Employment Services v. *Hodory*, 431 U.S. 471 (1977) 30, 34
Olcott v. *Supervisors*, 83 U.S. (16 Wall.) 678 (1873) 47
Old Dominion Land Co. v. *United States*, 269 U.S. 55 (1925) 47, 54, 55
Olson v. *United States*, 292 U.S. 246 (1934) 48
O'Neill v. *Leamer*, 239 U.S. 244 (1915) 47, 57
Opinion of the Justices, 152 Me. 440, 131 A.2d 904 (1957) 51
Ozark Coal Co. v. *Pennsylvania Anthracite R. Co.*, 97 Ark., 495, 134 S.W. 634 (1911) 64
Parkersburg v. *Brown*, 106 U.S. 487 (1882) 47
Patsy v. *Florida Board of Regents*, 457 U.S. 496 (1982) 25

TABLE OF AUTHORITIES—Continued

Page

Penn Central Transp. Co. v. *New York City*, 438 U.S. 104 (1978) 40, 61
Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393 (1922) 48, 62, 80
People v. *Van Rensselaer*, 9 N.Y. 291 (1853) 70
Philadelphia v. *New Jersey*, 437 U.S. 617 (1978) .. 80
Phillips v. *Foster*, 215 Va. 543, 211 S.E.2d 93 (1975) 51
Pittsburgh, W. & K. Railroads Co. v. *Benwood Iron-Works*, 31 W.Va. 710, 8 S.E. 453 (1888) 50, 64
Poletown Neighborhood Council v. *City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981) (*per curiam*) 56
Port Authority of St. Paul v. *Groppoli*, 295 Minn. 1, 202 N.W.2d 371 (1972) 65
Preiser v. *Rodriguez*, 411 U.S. 475 (1973) 34
Procunier v. *Martinez*, 416 U.S. 396 (1974) 27, 28
Pruneyard Shopping Center v. *Robins*, 447 U.S. 74 (1980) 81
Public Utilities Comm'n v. *United States*, 355 U.S. 534 (1958) 37
Puerto Rico v. *Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946) 56, 57
Railroad Comm'n v. *Pullman Co.*, 312 U.S. 496 (1941) 15
Railway Labor Executives' Ass'n v. *Gibbons*, 455 U.S. 457 (1982) 65, 79
Raymond Motor Transportation, Inc. v. *Rice*, 434 U.S. 429 (1978) 80
Redee Inlet Authority v. *Bastian*, 206 Va. 906, 147 S.E.2d 131 (1966) 51, 64
Redevelopment Agency of Fresno, Inc. v. *Herrold*, 86 Cap. App. 3d 1024, 150 Cal. Rptr. 621 (1978) 65
Reed v. *City of Seattle*, 124 Wash. 185, 213 P. 923 (1923) 51
Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) 76
Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 (1980) 39

TABLE OF AUTHORITIES—Continued

Page

Rindge Co. v. *County of Los Angeles*, 262 U.S. 700 (1923) 47, 52, 56, 63
Sadler v. *Langham*, 34 Ala. 311 (1859) 64
San Diego Gas & Elec. Co. v. *City of San Diego*, 450 U.S. 621 (1981) 78, 79
Santosky v. *Kramer*, 455 U.S. 745 (1982) 66
Schlesinger v. *Councilman*, 420 U.S. 738 (1975) 34
Schuttlesworth v. *City of Birmingham*, 394 U.S. 147 (1969) 26
Sears v. *City of Akron*, 246 U.S. 242 (1918) 47, 63
Shizas v. *City of Detroit*, 333 Mich. 44, 52 N.W.2d 589 (1952) 50
Shoemaker v. *United States*, 147 U.S. 282 (1893) 47, 63
Sosna v. *Iowa*, 419 U.S. 393 (1975) 30
Southern Ry. Co. v. *City of Memphis*, 126 Tenn. 267, 148 S.W. 662 (1912) 64
Souza v. *Estate of Bernice Pauahi Bishop*, Civil No. 79-0339 (D. Haw. Mar. 6, 1981) (Opinion & Order denying class certification), *petition for permission to appeal denied*, No. 81-8029 (9th Cir. Apr. 6, 1981) (Order) 12
Sporhase v. *Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) 80
State v. *Anderson*, Civil No. 43937 (Haw. Cir. Ct.) 14
State v. *Bank of California*, 5 Wash.App. 861, 491 P.2d 697 (1971) 51, 65
State ex rel. Clothier v. *Yeaman*, 465 S.W.2d 632 (Mo. 1971) 65
State ex rel. Ford Motor Co. v. *District Court*, 133 Minn. 221, 158 N.W. 240 (1916) 64
State Highway Comm'n v. *Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967) 65
Steagald v. *United States*, 451 U.S. 204 (1981) 32
Steffel v. *Thompson*, 415 U.S. 452 (1974) 35
Stewart v. *Gorter*, 16 A. 644 (Md. 1889) 68
Strickley v. *Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906) 47, 56
Swisher v. *Brady*, 438 U.S. 204 (1978) 30
Talbot v. *Hudson*, 16 Gray 417 (Mass. 1860) 64
Taylor v. *Porter & Ford*, 4 Hill 140 (N.Y. 1843) 49, 70

TABLE OF AUTHORITIES—Continued

Page

Texaco, Inc. v. *Short*, 454 U.S. 516 (1982) 69, 85
Thompson v. *Consolidated Gas Util. Corp.*, 300 U.S. 55 (1937) 47, 63, 69
Threlkeld v. *Third Judicial District Court*, 36 N.M. 350, 15 P.2d 671 (1932) 51
Toft v. *Ketchum*, 18 N.J. 280, 113 A.2d 671, *cert. denied*, 350 U.S. 887 (1953) 36
Town of Lockport v. *Citizens for Community Action*, 430 U.S. 259 (1977) 38
Trustees of Sheppard & Enoch Pratt Hospital v. *Swift & Co.*, 178 Md. 200, 13 A.2d 174 (1940) 88
Tumey v. *Ohio*, 273 U.S. 510 (1927) 84
United States v. *564.56 Acres of Land*, 441 U.S. 506 (1979) 81
United States v. *Carmack*, 329 U.S. 230 (1946) 47
United States v. *Gettysburg Elec. Ry. Co.*, 160 U.S. 668 (1896) 54, 55, 56
United States v. *Lee*, 455 U.S. 252 (1982) 66
United States v. *New Mexico*, 438 U.S. 696 (1978) 67
United States v. *New River Collieries Co.*, 262 U.S. 341 (1923) 81
United States v. *New York*, 160 F.2d 479 (2d Cir.), *cert. denied*, 331 U.S. 832 (1947) 63
United States v. *Ortiz*, 422 U.S. 891 (1975) 32
United States v. *Security Indus. Bank*, 459 U.S. 70 (1982) 81
United States v. *Sioux Nation of Indians*, 448 U.S. 371 (1980) 66, 81
United States Dep't of Agriculture v. *Moreno*, 413 U.S. 528 (1973) 83
United States ex rel. TVA v. *Powelson*, 319 U.S. 266 (1943) 51
United States ex rel. TVA v. *Welch*, 327 U.S. 546 (1946) ..... *passim*
United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977) 87, 88
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TABLE OF AUTHORITIES—Continued

Page

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Wisconsin v. *Constantineau*, 400 U.S. 433 (1971) .. 26, 28, 29
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Ark. Const. art. II, § 22 49
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TABLE OF AUTHORITIES—Continued

	Page
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Del. Const. art. I, § 8	49
Fla. Const. art. X, § 6	49
Ga. Const. art. I, § 3 ¶ 1	49
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art. XI § 10	49
Idaho Const. art. I, § 14	49
Ill. Const. art. I, § 15	49
Ind. Const. amend. V	49
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Mass. Const. Part 1, art. X	49
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N.J. Const. art. 1, ¶ 20	49
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N.Y. Const. art. 1, § 7	49
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TABLE OF AUTHORITIES—Continued

	Page
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42 U.S.C. § 1983	32
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101	36
101-34	36
170-50.1	75
170-50.2	75
171-13	75
171-32	11, 71
171-44	11, 71
171-45	11, 71, 75
171-60	11, 71, 75
171-70-171-84	75
171-72	11, 71
171-93	11, 71
Ch. 206	75
356-18	36
516 et al.	*passim*
519-2	7, 20, 75
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519-2(b)	72
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TABLE OF AUTHORITIES—Continued

	Page
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Page

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	Page
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Page

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-141

HAWAII HOUSING AUTHORITY, *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

No. 83-236

PORTLOCK COMMUNITY ASSOCIATION, *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

No. 83-283

KAHALA COMMUNITY ASSOCIATION, INC., *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR APPELLEES

Appellees Frank E. Midkiff, *et al.*[1], Trustees of the Kamehameha Schools/Bishop Estate ("Trustees"), re-

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[1] Frank E. Midkiff, Richard Lyman, Jr., Hung Wo Ching, Matsuo Takabuki, and Myron B. Thompson. As counsel for Trustees informed the Court by letter dated December 23, 1983, Mr. Midkiff is recently deceased and no successor has yet been appointed. William S. Richardson has succeeded Mr. Ching.

spectfully urge affirmance of the judgment of the Court of Appeals, which held facially unconstitutional Part II of Hawaii Revised Statutes Chapter 516.[2]

STATEMENT

I. THE NATURE OF THE CASE.

One of the fundamental rights protected by our Constitution is the right to secure enjoyment of private property. Throughout our history, this right has been subject only to the state's regulatory authority and, in narrowly defined situations, the state's ultimate sovereign power to take property for a *bona fide* "public use." The statute in issue abrogates this right.

The briefs of appellants[3] underscore the novelty of the statute and the radical constitutional doctrine which is necessary to sustain it. If the statute is upheld, it will provide an easy model by which any legislature, responding to the pressures of some of the electorate and to the occasion violent swings of political processes, can nullify the explicit textual constitutional protection afforded every person against the state's exercise of its eminent domain power for private uses.

Chapter 516 authorizes the immediate transfer of title to Trustees' property to the lessees under circumstances in which the transfers (a) can be performed only at the behest of the individual lessees who will receive the property; (b) will be compensated by the lessees themselves, rather than the government or the public at large; (c) apply only to the specific lots for which lessees have applied, and upon which the lessees already own houses; (d) shift private property from one private party to another; (e) do not change the use, usability, possession,

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[2] Hereinafter "Chapter 516." Citations are to the 1976 replacement volume, as amended through the 1980 session of the Hawaii State Legislature, unless otherwise noted. The statute as so amended is reproduced in full in the Hawaii Housing Authority JS App. A109-140.

[3] Herein referred to as "HHA Br." and "Portlock Br."

or occupancy of the lots taken under the Act or their environs; (f) involve the state simply as the conduit for the transfer of title without any accompanying, or even contemplated, system of continuing regulation, oversight, or control of the transferred properties or their environs; and (g) do not require or contemplate, as a prerequisite to condemnation, that the lessees adhere to a predetermind comprehensive land-use plan or agree to any restrictions of any kind upon their subsequent alienation of those lots once the lessees have obtained title thereto. Surely if condemnations of this type do not constitute a purely private transfer of property, no condemnations can ever be so labeled. As we shall also show, the statute violates the Fourteenth Amendment Due Process Clause and the Contract Clause of the Constitution.

II. TRUSTEES AND THE AFFECTED LEASEHOLDS.

A. Trustees and the Schools.

Trustees administer the Will of Princess Bernice Pauahi Bishop, great-granddaughter and last lineal descendant of Kamehameha the Great, the first monarch of Hawaii.[4] The nucleus of her Will was a perpetual charitable trust for the establishment and support of the Kamehameha Schools.[5] The Schools provide a wide array of educational services for children of Hawaiian ancestry in kindergarten through high school.[6] In addition, the Schools reach

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[4] Pursuant to direction of the Will, successor trustees are appointed by the Justices of the Supreme Court of Hawaii.

[5] The Kamehameha School for Boys opened in 1887, and the School for Girls opened seven years later. Today, the combined Schools enroll 2,850 students full-time and 9,000 part-time, or approximately one-quarter of all school aged youth of Hawaiian ancestry. 129 Cong. Rec. S17,205 (daily ed. Dec. 14, 1983) (statement of Sen. Matsunaga).

[6] JA 46-47. In 1853, 95.8% of the Islands' population was Hawaiian, whereas by 1980 only 1% of the population was Hawaiian and 17.9% part-Hawaiian. Department of Geography, University of Hawaii, *Atlas of Hawaii* 112 (2d ed. 1983). Concern about the decimation of the Hawaiian people motivated Princess Bernice to endow the Schools. *Id.* at 103.

a broad segment of the Hawaiian community through their Extension Education Division.[7]

Upon her death in 1884, the Princess' estate consisted of lands (virtually all inherited from other members of the Royal Family [8]) which then comprised about 11% of the lands in the Islands. As a result of exchanges, sales, and condemnations over the years, the trust lands now comprise about 8% of the land area in Hawaii, but much of this land is inaccessible or otherwise unusable, *e.g.*, in lava fields and watershed areas. These unusable lands, together with those zoned and used for agriculture, comprise over 97% of the Trustees' land holdings. Less than 3% of the trust lands is devoted to residential, resort, and commercial use, and the income generated from these parcels provides nearly the sole support for the Schools.[9]

Trustees' land presently serves an indisputable public use.[10] In stark contrast, Chapter 516 empowers private

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[7] Approximately 24,000 additional individuals annually receive educational benefits from the Schools through workshops, demonstrations, lectures, and other short-term educational contacts. 129 Cong. Rec. S17,205 (daily ed. Dec. 14, 1983) (statement of Sen. Matsunaga).

[8] As the amicus brief of the Hou Hawaiians describes, land formed the basis of the Hawaiian culture. Private land ownership was unknown; the chiefs and the king held and administered the land for the benefit of all the people. The destruction of this so-called "feudal" system of landholding coincided with the virtual destruction of the native Hawaiians. Lopez-Reyes, *The Demise of the Hawaiian Kingdom*, 13 Haw. B.J. 3, 6, 11-13 (1983). Through her wisdom and foresight, Princess Bernice preserved intact the last major Hawaiian landholding, with its use devoted, as dictated by custom, to her people's benefit.

[9] Tuition and fees provides less than 15% of the Schools' annual budget (JA 46-47).

[10] The Schools recently were acclaimed, by the Chairman of the U.S. Senate Education Subcommittee, "as a prime example of what our nation's private elementary and secondary schools have the potential for becoming; that is, a true living laboratory combining practical experience with ongoing quality [educational] research endeavors." 129 Cong. Rec. S17,205 (daily ed. Dec. 14, 1983) (statement of Sen. Stafford).

lessees, at their election, to compel appropriation of Trustees' land for purely personal purposes. Ironically, at a time in American history when the rights and special needs of the aboriginal [11] population are finally receiving recognition,[12] this statute strikes at the jugular of a unique non-profit trust dedicated to providing quality education for an underprivileged native group.[13]

B. The Leasehold System in Hawaii.

Leasing of residential lots in Hawaii did occur prior to World War II, but there were relatively few leaseholds as compared to lots owned in fee simple. The number of leasehold lots substantially increased after World War II due to heavy demand for single family residences and the minimum capital available to the families requiring new housing.[14] The practice of leasing, rather than selling,

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[11] Hawaiians, along with American Indians, Aleuts, and Eskimos, are the only groups defined as natives under the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1981), a dramatic recognition on a nationwide level that these are people whose traditions, culture and religion are deserving of special protection and preservation.

[12] Congress has found that "like other Native Americans, Native Hawaiians rank among the lowest in level of educational attainment and per capita income." Pub. L. 96-374, 94 Stat. 1499 (1980) (codified at 20 U.S.C. § 1221-1). As part of its goal of promotion of economic and social self-sufficiency of the Hawaiians, Congress established the Native Hawaiian Study Commission to investigate the unique "culture, needs and concerns of the Native Hawaiians." Pub. L. 96-565, 94 Stat. 3324-3327 (1980) (codified at 42 U.S.C. § 2991a).

[13] In 1963, when the Hawaii Legislature considered a bill to allow the conversion of residential leases to fee simple ownership, Hawaiian clergymen denounced the legislation from their pulpits, held emotional prayer sessions, and led a torchlight parade and vigil outside the capitol while the legislators debated the merits of the bill. *See Honolulu Advertiser*, April 4, 1963, at 1, and April 12, 1963, at 1; *Honolulu Star-Bulletin*, April 24, 1963, at 1, and April 30, 1963, at 33. The bill failed to pass.

[14] Indeed, it is ironic that the Bishop Estate's decision in this period to assist the state in alleviating the housing shortage by leasing Estate land should now be punished by a threatened loss of that property.

residential lots in newly-developed subdivisions arose mainly from three factors. Most persons (primarly veterans and other young people) were unable to pay for fee simple title to *both* the lots *and* the residences upon the lots. Most new lots were developed on land owned by landholders [15] who had held the land for decades, had an extremely low "basis," and would have had to pay ordinary income tax on nearly 100% of fee simple sale proceeds as "dealers." [16] And restrictions in trust instruments of some landholders inhibited sales.[17] Nonetheless, there is an abundance of fee simple land in Hawaii.[18]

Since the 1950's, most of Trustees' leases have been on FHA and VA approved forms to permit lessees to finance purchase of their homes through mortgages with FHA or VA guarantees. A typical lease [19] has a 55-year term, with annual rental fixed for the first 25 to 40 years

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[15] Most, but by no means all, were relatively large landowners. Many subdivisions of fewer than 50 lots were developed and leased by owners of small tracts. These subdivisions, too, are impacted by the statute (JA 51).

[16] Trustees, who are in this group, also had to be concerned with protecting the status of the trust as a tax exempt organization.

[17] For instance, the Princess' Will directs the Trustees "to keep and manage" rather than sell trust lands except when funds are needed for construction at the Schools, or when the Schools' best interests would thereby be served.

[18] On the Island of Oahu, as of January 1, 1982, there were 72,839 owner-occupied units (single *and* multi-family) where the land was owned in fee simple, as compared with 35,539 leasehold units. *The State of Hawaii Data Book* table 486, at 497 (1982). Cumulative statistics covering single-family units alone have not been published. Figures are available for recent sales and show that fee simple sales have heavily predominated over leasehold sales of newly developed units. In 1981, for example, on Oahu, 69% of newly-built single-family units were on land sold with the residence in fee, and 31% were on land leased to the purchaser of the residence. *Construction in Hawaii* (Bank of Hawaii 1982). Virtually all of the residential leaseholds affected by Chapter 516 are located on the Island of Oahu.

[19] Typical lease forms are found in the Supplementary Joint Appendix.

of the term. Upon expiration of the initial fixed rental period, lessor and lessee renogotiate a new rent based upon a percentage of the market value of the land, exclusive of the value of structures on the land. Almost all leases provide for arbitration of conflicting views. The rent that can be charged on the reopening of the stipulated rental, however, has been restricted by legislation.[20] Lessees may freely assign and mortgage their leases.[21] The majority of Trustees' residential leases in effect at the onset of this litigation were executed prior to the enactment of Chapter 516.

III. THE STATUTE.

The true objective of the statute was exposed at its inception, when it was described as a vehicle "to provide means by which the lessees of residential leasehold lots may become vested with the fee simple title to their lots." [22] The statute demonstrates its unmistakably pri-

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[20] New rent is limited to 4% of a legislatively defined "owner's basis," which drastically reduces the value of Trustees' interest in the lots. Haw. Rev. Stat. § 519-2.

[21] All of these provisions of the leases are further amplified and assured by the "Lessees' Bill of Rights," not in issue in this litigation. Part III of Chapter 516, Haw. Rev. Stat. §§ 516-61 through 70. It applies to all residential lots under long-term lease, and guarantees the right to assign, the opportunity to cure default, the right to extend to a remaining term of 55 years, a formula for determining rent upon extension, and other rights (*see* note 182, *infra*). Part III *does not restrict* the use of the land by the lessee-acquirers, *i.e.*, persons acquiring the lessors' interest under the statute, or protect future lessees unless the new leases are for periods of 20 years or longer.

[22] Conf. Comm. Rep. No. 19 on S.B. No. 1128 (Act 307), 1967 Senate Journal 800; Conf. Comm. Rep. No. 18 on S.B. No. 1128 (Act 307), 1967 House Journal 859. It is significant that none of the appellants included in their Appendices or the Joint Appendix *any* legislative history—an inclusion which they would have been expected to make in view of their reliance upon legislative findings. The reason for their omission is that the legislative history simply did not include the type of support that ordinarily precedes important legislation of the type encountered here. The legislature

vate objectives throughout its provisions,[23] which, briefly summarized, are as follows:

1. The statute applies to residential lots, located in "development tracts," held under leases for terms of 20 years or more.[24] "Development tracts" are defined as tracts not less than five acres in size.[25]

2. Proceedings under Part II of the statute to take the fee simple title to lots may *never* be commenced on the state's initiative, but may be commenced *only* if and after lessees of at least 25 lots or 50% of the lots (whichever is less) in a development tract have applied to the Hawaii Housing Authority ("HHA") to purchase the fee interest in their lots.[26] Expenses incurred by HHA in the proceedings are to be paid by the applicant lessees, who are re-

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held many hearings, as pointed out by a state court judge in another case relied upon by appellants (*see* Portlock Br. Ex. A26-A59). Yet when that same judge wanted to cite to the information supposedly relied upon by the legislature for its findings—the reports, surveys, treatises, articles, factual summaries, etc., that are normally part of a legislative record—he could only state that the listed materials were "available to and/or before the legislature." *Id.* at A112; *see also id.* at A60-A63. This was evidence of *not* what the legislature *did* consider but of what it *might* have considered. Such surmise can hardly substitute for adequate hearings, reports, and findings during the legislative process itself.

[23] Some of the provisions were declared unconstitutional by the District Court (*see* notes 31, 32, and 57, *infra*). The statute was changed by amendments enacted subsequent to the filing of the complaint. These amendments do not affect the issues presented on this appeal: 1979 Haw. Sess. Laws, Act 227, 1980 Haw. Sess. Laws, Acts 39 and 107, and 1983 Haw. Sess. Laws, Acts 203, 204, and 270 (*see* notes 31 and 32, *infra*).

[24] Haw. Rev. Stat. §§ 516-21, 516-1(5) & (11).

[25] Haw. Rev. Stat. § 516-1(2). Most residential lots are 6,000 to 12,000 square feet in area. Allowing for streets, not more than six lots can be developed per acre.

[26] Haw. Rev. Stat. § 516-22 authorizes HHA to designate all or a portion of a development tract for condemnation only *"after"* the requisite member of lessees have applied for designation (emphasis added).

quired to forward a deposit for that purpose.[27] HHA, after a hearing, must find that acquisition of all or some of the lots in a tract will effectuate the purposes of the statute.[28] Since the Act states that any condemnation is for public use, HHA's hearing and resulting findings are entirely ministerial in nature, as evidenced by experience under the statute.[29]

3. HHA then instructs the lessor and the lessees to negotiate the "just compensation which the *lessees* will pay" for the fee simple title.[30] If the parties fail to agree, HHA directs them to commence compulsory arbitration.[31] Statutory formulae are provided for determination of compensation.[32]

4. HHA obtains from applicant lessees information verifying that they are "qualified" [33] to purchase the les-

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[27] Haw. Rev. Stat. § 516-33.5.

[28] Haw. Rev. Stat. § 516-22.

[29] *See* Transcript of District Court Proceedings, April 24-27, 1979 (preliminary injunction hearing) (JA 164-165).

[30] Haw. Rev. Stat. § 516-51(a) (emphasis added); *see also* HHA JS App. A131-A132 and note 31, *infra*.

[31] Haw. Rev. Stat. Chapter 516, Part IIA, §§ 516-51 through 516-55 (1976 repl.). The compulsory arbitration provisions of this part were declared unconstitutional by the District Court, and HHA was permanently enjoined from taking further action with respect to this statutory provision (*see* note 57, *infra*). No appeal was ever taken from this ruling. Thereafter, the legislature amended the statute to repeal the compulsory arbitration provisions and to provide for mandatory negotiation. 1980 Haw. Sess. Laws, Act 107, § 3. The validity of this amendment and the ones mentioned above (note 23) remains to be tested, but is immaterial if the Court of Appeals' judgment is affirmed.

[32] Haw. Rev. Stat. §§ 516-1(14) (1976 repl.) and 516-24. Exclusive use of these formulae was ruled unconstitutional by the District Court. After this ruling, and purportedly in compliance with it, the legislature amended the statute to preclude sole reliance upon the formulae. 1980 Haw. Sess. Laws, Act 107, § 2 (codified at Haw. Rev. Stat. § 516-1(14) (HHA JS App. A113-A114)).

[33] Haw. Rev. Stat. § 516-33. Among other requirements, the applicant lessee must be the owner of the residence upon the leased premises *and* either have a bona fide intent to live in the development tract *or* be a resident of the state of Hawaii. Haw. Rev. Stat.

sor's fee simple title and financial statements or evidence demonstrating their ability to pay the probable prices at which fee simple titles to their lots will be transferred to them through the condemnation proceedings.[34] HHA then "designates" for acquisition the lots for which qualified lessees have applied,[35] and thereafter institutes a condemnation action against them. While HHA is the nominal party plaintiff, the lessees, as the real parties in interest, are named (along with the lessor-fee simple owner) as parties defendant.[36] Upon conclusion of the condemnation proceedings, the fee simple title to the lots is transferred to the applicant lessees upon their payment of the adjudicated compensation.[37] The remaining lots in the development tract are not involved in the statutory proceedings, but may be adversely affected in fact (note 215, *infra*).

5. Funds to satisfy the condemnation award are supplied entirely by the lessees.[38] While the statute authorizes state bonds to be issued and funds to be appropriated

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§ 516-33(2) & (3). The legislature thus gave its tacit approval to the use of Chapter 516 for speculative purposes, by its recognition that many lessees would not reside in the purchased premises but would instead rent, lease, or sell them.

[34] Haw. Rev. Stat. § 516-33(4).

[35] Haw. Rev. Stat. §§ 516-22 and 516-23. Since HHA need not acquire all lots in the development tract, lots are designated for acquisition in a checkerboard pattern based solely upon the wishes of individual lessees who desire and are financially able to purchase fee title to their lots (*see* Transcript of District Court Proceedings April 24-27, 1979 (preliminary injunction hearing) (JA 164)).

[36] According to HHA, the lessees are named as defendants because they "have a direct interest in the amount of compensation and damages, if any, to be awarded * * *, in that said amount will ultimately be borne by the lessees who purchase the houselots * * *." *E.g.*, Complaint, ¶ 3, filed in 1980 in *Hawaii Housing Authority* v. *Midkiff*, Civil No. 60465 (Haw. Cir. Ct.), a copy of which is attached as Exhibit "A" to Trustees' Memorandum in Opposition to Motion for Partial Summary Judgment, filed in the District Court (Court of Appeals Record, at 158).

[37] Haw. Rev. Stat. § 516-30.

[38] JA 164 (*see also* notes 27 and 36, *supra*).

for HHA acquisitions, no bonds have been issued in the 17 years of the statute's existence, only token funds have been appropriated, and HHA has not supplied any funds for condemned lots.[39]

6. Part III of the statute, often referred to as the "Lessees' Bill of Rights," is not at issue in this case. It should be noted, however, that Part III *does not restrict* the lessee-acquirers from reimposing the same long-term leaseholds the legislature has supposedly found so harmful, or protect new lessees under their new leases unless the new leases are for periods of 20 years or longer.[40]

7. Part IV of the statute sets out legislative findings and declarations, adopted in 1975 when the legislature sought to strengthen the statute's claims to constitutional legitimacy.[41] These recite a concentration of land owner-

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[39] The first attempt to provide public financing occurred in 1971 Haw. Sess. Laws, Act 215, which authorized the issuance of $5,000,000 in general obligation bonds. As noted below (*see* note 51, *infra*), the Hawaii Attorney General challenged the constitutionality of the Act and the use of public credit to finance acquisitions. The bonds were never issued. In 1975, the legislature appropriated $1.3 million for a test case aimed at another lessor's small subdivision. The case was settled, and the test did not come about. Act 270, 1983 Haw. Sess. Laws authorized taxable revenue bonds, but only at private expense. No such bonds have been issued.

[40] Haw. Rev. Stat. §§ 516-61 and 516-1(5). Indeed, other state statutes providing for disposition of public lands make it apparent that there is not now and never has been any government policy against the practice of leasing for a long period, whether of residential or other lands. Disposition of public lands is *required to be by lease only* unless otherwise specifically authorized. Haw. Rev. Stat. § 171-32. Leasing of public lands for residential purposes is specifically authorized by Haw. Rev. Stat. §§ 171-44, 171-45, 171-60, 171-72 and 171-93. Statutory requirements make leases of public lands more restrictive than those made by private landowners who have conformed their lease forms to FHA and VA requirements.

[41] The legislature recited that although the Act "has been in full effect for nearly six years it has not been implemented" for reasons including "possible legal or constitutional difficulties * * *." 1975 Haw. Sess. Laws, Act 186, § 1 (HHA JS App. A152). Interestingly, the Hawaii Attorney General had previously brought suit to have the Act declared unconstitutional on the ground, among others,

ship in a few hands;[42] claim that the practice of leasing rather than selling has resulted in a shortage of "fee simple residential land";[43] refer to the high cost of land and the need to check the "inflationary trend of land";[44] and assert the right of the state to exercise the power of eminent domain for the purpose of "allowing lessees under long-term leases of residential land to purchase [that land] * * *."[45] As the Court of Appeals properly recognized, the findings are mere rationalizations for clearly private takings (HHA JS App. A21).

8. Further emphasizing the private motivation of the statute is its history of amendments, which have progressively facilitated acquisitions by private lessees and have relegated the role of HHA to the purely ministerial function of acting as a conduit for transfer of title. For example, the original statute required HHA to condemn only *entire* development tracts, but a 1975 amendment allows condemnation of only those lots which lessees have applied to purchase.[46] In 1976, probably recognizing that

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that it failed to satisfy the Public Use requirement. That suit was never pursued to a judgment on the merits (*see* note 51, *infra*).

[42] Haw. Rev. Stat. § 516-83(a)(1). Notwithstanding repeated assertions in HHA's brief to the contrary, the Hawaii Legislature has made no finding, nor has any court ever found, that a "land monopoly" exists in Hawaii. As a basis for its extensive "land monopoly" argument (HHA Br. 1-6), HHA relies upon a single committee report (Conf. Comm. Rep. No. 19 on S.B. No. 1128 (Act 307), 1967 Hawaii Senate Journal 799), the loose language of which was never adopted by the legislature. A private antitrust suit brought several years ago against various landowners, including Trustees, remains at the pretrial discovery stage. *Souza* v. *Estate of Bernice Pauahi Bishop*, Civil No. 79-0339 (D. Haw. Mar. 6, 1981) (Opinion and Order denying class certification), *petition for permission to appeal denied*, No. 81-8029 (9th Cir. Apr. 6, 1981) (Order).

[43] Haw. Rev. Stat. § 516-83(a)(2).

[44] Haw. Rev. Stat. § 516-83(a)(6) & (7).

[45] Haw. Rev. Stat. § 516-83(a)(9).

[46] *Compare* 1967 Haw. Sess. Laws, Act 307, § 11, *with* 1975 Haw. Sess. Laws, Act 184, § 2(6) (codified at Haw. Rev. Stat. § 516-22) (*see* note 35, *supra*).

fee simple residential properties are indeed readily available (notwithstanding "findings" to the contrary), the legislature deleted the requirement that HHA find a shortage of fee simple residential properties before designating lots for acquisition.[47] In 1978, the legislature made it possible for lessee-speculators to take advantage of this statute by removing the requirement that the lessee-acquirer live in the tract to be condemned.[48]

IV. THE COURSE OF THE PROCEEDINGS.

A. Background.

The initial version of Chapter 516 was enacted as Act 307 in 1967.[49] For nearly a decade the statute lay dormant,[50] in part due to unanswered questions regarding its constitutionality,[51] and in part due to the continuance

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[47] *Compare* 1967 Haw. Sess. Laws, Act 307, § 11, *with* 1976 Haw. Sess. Laws, Act 242 § 2 (codified at Haw. Rev. Stat. § 516-22). Note, also, that a statute enacted prior to Chapter 516, that is, 1961 Haw. Sess. Laws, Act 6 (codified at Haw. Rev. Stat. Chapter 206), authorized the Hawaii Board of Land and Natural Resources to acquire land for residential development if, after public hearing, it found "that in any locality on the island of Oahu an acute shortage of residential fee simple property exists." Haw. Rev. Stat. § 206-5. In the 23 years the statute has been on the books, the Board has neither made any such finding nor acquired any land for development.

[48] 1978 Haw. Sess. Laws, Act 140, § 2 (codified at Haw. Rev. Stat. § 516-33(2)); *compare* § 516-33(2) (1976 repl.). Another recent amendment, substituting mandatory negotiation of price for mandatory arbitration, preserves the lessee's opportunity to withdraw before condemnation if the negotiations indicate he may be compelled to pay a price not to his liking. 1980 Haw. Sess. Laws, Act 107, § 3 (codified at Haw. Rev. Stat. § 516-51).

[49] 1967 Haw. Sess. Laws, Act 307.

[50] Prior to these proceedings, all actions under the purported authority of the statute were carried out by voluntary agreement among the lessors and the lessees (*see* Transcript of District Court Proceedings April 24-27, 1979 (preliminary injunction hearing) (JA 164)).

[51] Act 307 gave the Hawaii Supreme Court original jurisdiction of suits questioning the statute's constitutionality—a provision re-

of low rents fixed at the inception of the leases.[52] Beginning in 1978, after a series of liberalizing amendments to improve the lessees' litigation position,[53] Trustees' land became a target for acquisition under Chapter 516. After disposing of inconsequential administrative prerequisites to the involuntary condemnation of Trustees' fee title, HHA on January 22, 1979, directed Trustees to submit to mandatory arbitration for prima facie determination of the prices to be paid to Trustees by lessees in Tract H of the Waialae-Kahala subdivision in Honolulu for the taking of the fee simple title.[54] Under state law, none of these administrative proceedings was part of any later-filed state court condemnation suit;

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pealed in 1975. Trustees filed two such actions in 1967 (*Midkiff* v. *Hasegawa*, No. 4727, and *Midkiff* v. *McCormack*, No. 4728), and another residential lessor filed a similar action (*Davis* v. *Finance Realty*, No. 4735). HHA and the State of Hawaii were defendants in the three suits. When the legislature rendered moot many of the questions raised, through statutory amendments designed to blunt the Complaints (1968 Haw. Sess. Laws, Act 46), the suits were dismissed without prejudice. Recognizing that the legislature could legislate faster than Trustees could litigate, Trustees declined to seek judicial protection again until the statute was applied against them. Meantime, in 1975, the Hawaii Attorney General brought suit against the Hawaii Budget Director challenging the constitutionality of the statute on the ground, among others, that it provided for taking private property for non-public uses. This, too, was dismissed without prejudice. *State* v. *Anderson*, Civil No. 43937 (Haw. Cir. Ct.).

[52] In most residential leases, rent is fixed for a period of 25 to 40 years, with rent for the remaining term to be renegotiated or arbitrated at the end of the fixed rent period (typical leases are reprinted in the Supplemental Joint Appendix). Rents fixed in many leasehold tracts developed shortly after World War II became less than nominal as land values increased. Thus, until these rents began to come up for renegotiation in the 1970's, there was no economic incentive for a lessee to abandon the rent bargain by purchasing fee title.

[53] *See, e.g.*, notes 46-48 and accompanying text, *supra*.

[54] HHA JS App. A102 n.52. Trustees and the lessees in Tract H ultimately agreed upon a voluntary sale, and the Tract H Community Association withdrew from participation in this lawsuit.

Haw. Rev. Stat. § 516-51(b) (1976 repl.) explicitly provides that "[t]his mandatory arbitration shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain."[55] Nonetheless, Trustees felt that the threat to their property was no longer speculative. Rather than submit to mandatory arbitration, Trustees brought the present action.

B. The Proceedings Below.

1. Before any state court condemnation suits were filed against them,[56] Trustees filed this suit on February 28, 1979, seeking a declaratory judgment that Chapter 516 is unconstitutional and an injunction against its enforcement.[57] In its answer, HHA adverted to only the doctrine of *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941), as a basis for abstention, and did not assert

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[55] After the District Court had ruled that the mandatory arbitration provisions were unconstitutional, the legislature amended this section to substitute the term "preliminary negotiation" for the term "mandatory arbitration" (1980 Haw. Sess. Laws, Act 107, § 3; HHA JS App. A131-A132).

[56] The Court of Appeals' express finding to this effect (HHA JS App. A2-A4 n.1) is plainly correct.

[57] Trustees' complaint (JA 45 *et seq.*) asserted that the use of eminent domain for the taking of fee simple titles for transfer to lessees was solely for private use in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. Moreover, the complaint alleged that the Act was an arbitrary exercise of the state's police power, in violation of the Fourteenth Amendment Due Process Clause. The complaint also alleged that the statute did not vest power in the state or its agency, HHA, to make the essential determination as to which, if any, lots should be taken, but, rather, unconstitutionally delegated that power to lessees. Further, the complaint alleged that the statute contravened the Contract Clause of the Constitution because it abrogated the terms of pre-existing lease contracts.

The complaint also asserted the unconstitutionality of the compensation and the compulsory arbitration provisions of the statute; these provisions were held unconstitutional by the District Court and are not in issue before this Court (*see* HHA JS App. A95-A101; JA 106-107).

that any other abstention doctrine was appropriate.[58] Several private organizations, representing lessees of appellees' property, later intervened.[59] Like HHA, the only abstention doctrine adverted to in any of the intervenors' answers was *Pullman* (JA 76, 80).[60]

The District Court, on February 28, 1979, issued a temporary restraining order against enforcement of the Act, which it modified on March 27, 1979, to permit all procedural steps under the statute prior to mandatory arbitration and condemnation (HHA JS App. A78 & n.5). Trustees also moved for a preliminary injunction against the further enforcement of Chapter 516. In their oppositions to Trustees' motion, the only abstention

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[58] The only sentence in HHA's answer relating to abstention, Paragraph 18 (JA 64), stated:

> This court should abstain from ruling on the matters raised in the Complaint until such time as State courts have provided authoritative interpretations of provisions of Chapter 516, Hawaii Revised Statutes, which interpretations may preclude the necessity for a decision of the constitutional issues raised by the Complaint.

HHA later made clear, in its opposition to appellees' motion for a preliminary injunction, that the *only* abstention doctrine about which it was concerned, and which it was presenting to the District Court, was *Pullman* (see JA 82-86).

In a similar vein, Paragraph 8 of HHA's answer denied that any of the precomplaint administrative activities were steps leading toward the appropriation of Trustees' lots (JA 49), and Paragraph 17 alleged as a defense that Trustees' constitutional objections to the statute were "not ripe for adjudication" (JA 64).

[59] On March 23, 1979, the District Court granted motions of certain community associations, representing lessees, to intervene (JA 66-67). Some of these associations later withdrew from the case after their members purchased the fee titles to their lots in negotiated transactions. Except for one who did not appeal, the remaining intervenors are appellants now before the Court.

[60] Furthermore, intervenors admitted in their answers that Chapter 516 itself makes clear that the administrative proceedings antedating the filing of appellees' suit in federal court were "not part of any action in condemnation or eminent domain" (JA 71).

doctrine adverted to by HHA and some intervenors was *Pullman* (JA 81-86; *see* note 58, *supra*). After a hearing, the District Court issued its decision on Trustees' motion on May 8, 1979 (HHA JS App. A77 *et seq.*). The preliminary injunction itself was entered one month later, on June 8, 1979. The District Court did not enjoin condemnation of the fee simple title to leasehold lots,[61] but did restrain compulsory arbitration and exclusive use of the valuation formulae provided by the statute (JA 91-92). There were still no state court condemnation proceedings involving Trustees filed by this time. The first such suit against Trustees was filed on September 21, 1979 (HHA JS App. A30 (Poole, J.)).

After entry of the preliminary injunction, HHA and intervenors abandoned even their prior limited allusions to abstention. Without claiming that abstention was appropriate for *any* reason, they moved for partial summary judgment, asking the District Court to uphold the statute on the basis of the legislative findings. The first of these motions was filed on September 18, 1979 (JA 16, 93-94), still prior to the filing of any state court proceedings involving Trustees.

2. The District Court denied Trustees' demand for a trial, reaffirmed its prior rulings concerning mandatory arbitration and the valuation formulae, and, subject to such rulings, granted summary judgment against Trustees, holding that the condemnations authorized by Chapter 516 were for a public use.[62] It ruled that compelling "redistribution" (HHA JS App. A74)[63] of Trustees'

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[61] The District Court found that no state court judicial condemnation proceedings were imminent (HHA JS App. A104 n.58).

[62] The District Court's decision was embodied in its Amended Memorandum Decision on December 19, 1979 (HHA JS App. A64 *et seq.*).

[63] The use of this phrase throughout the District Court's opinion is unwarranted. No "land" redistribution is involved. The lessees (or their tenants) are already in possession, and only the "fee sim-

property to lessees is within the state's police power, and "hence" the takings are for a constitutional public use (*id.* at A67-A73). Alternatively, it held that the legislature's "economic findings" furnished an adequate basis for upholding the statute (*id.* at A74-A75).[64] Trustees appealed.

3. No appellant initially argued in the Court of Appeals that abstention was required for any reason; the Ninth Circuit panel raised this issue on its own during oral argument (HHA JS App. A30 & n.7 (Poole, J.)). After requesting and receiving post-argument briefing on this issue—in which both HHA and certain intervenors argued that abstention was *unwarranted* for *any* reason and asked the Court of Appeals to reach the merits of Trustees' claims—a majority concluded that abstention would have been improper (*id.* at A2-A4 n.1; *id.* at A22-A31 (Poole, J.)).[65]

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ple" interest is "redistributed"—taken from the owner and transferred to those lessees who apply and pay therefor.

[64] Finally, the District Court granted HHA's and intervenors' motion for partial summary judgment, ruling against Trustees on the remainder of their constitutional claims. A Final Judgment and Permanent Injunction, incorporating all rulings of the District Court, was entered on June 10, 1980 (JA 106-108).

[65] *First.* The court ruled that abstention was unnecessary under *Pullman* because of the clear statement of legislative intent in Haw. Rev. Stat. § 516-83(a)(12). Hence, there was no uncertain issue of state law, only the question of whether Chapter 516 was constitutional (HHA JS App. A2-A4 n.1; *id.* at A23-A24 (Poole, J.)).

Second. *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), did not require abstention because Hawaii had not funnelled all condemnation suits (and challenges thereto) into a single specialized court, and there was no question, inseparable from the federal claims, of whether the state had authority to effect these condemnations (*id.* at A2-A4 n.1; *id.* at A24-A25 (Poole, J.)).

Third. *Younger* v. *Harris*, 401 U.S. 37 (1971), did not require abstention because there were no state court proceedings pending at the time the District Court had entered a temporary restraining order (February 28) and, later, a partial preliminary injunction (June 8), since HHA did not file its first eminent domain suit against Trustees in state court until September 1979 (*id.* at A2-

On the merits, the court, by a divided vote, reversed. It ruled that Chapter 516 was unconstitutional because the Act simply transferred land from one private party to another in violation of the Public Use requirement of the Fifth and Fourteenth Amendments.[66]

C. State Court Proceedings.

At the time Trustees filed this suit, there were no pending state court proceedings involving, or which could have involved, Trustees' constitutional objections to the statute.[67] In fact, no such state court proceedings were

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A4 n.1). Judge Poole also concluded that HHA had waived any *Younger* claim (*id.* at A26-A31).

Fourth. Judge Poole concluded that *Colorado River Water Cons. Dist.* v. *United States*, 424 U.S. 800 (1976), was inapplicable because there were no exceptional circumstances, such as the McCarran Amendment, favoring state court litigation (*id.* at A25-A26).

[66] The Court of Appeals concluded: " 'It is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain. * * * For if the use be not public * * * the legislature cannot authorize the taking of private property against the will of the owner, notwithstanding compensation may be required' " (*id.* at A20, quoting *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U.S. 239, 252 (1905) (citation omitted); *see id.* at A33 (Poole, J.)). Because of the court's ruling, it did not consider Trustees' other arguments.

[67] None of the proceedings to which appellants refer (HHA Br. 9-11) was pending on the issues raised herein:

(1) *Wai-Kahala Tract "H"* v. *Midkiff*, Civil No. 55837:

On August 21, 1978, HHA directed Trustees to appoint an arbitrator within 30 days to establish just compensation for certain of their lots in Waialae Kahala Tract H. Upon expiration of that period, during which Trustees failed to appoint an arbitrator, the Tract H Community Association filed its complaint in Civil No. 55837 in Hawaii Circuit Court on September 29, 1978. That complaint sought only to have the Hawaii Circuit Court order mandatory arbitration pursuant to Chapter 516, and to appoint an arbitrator for Trustees because of Trustees' refusal to do so. The complaint did *not* put in issue the constitutionality of Chapter 516. Trustees filed their answer on October 10, 1978, claiming basically that the Circuit Court lacked jurisdiction over this matter, and that the plaintiff lacked standing to prosecute its complaint. After an evidentiary hearing, the Circuit Court entered its Findings of

filed until months after the District Court had issued a preliminary injunction restraining the use of the man-

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Fact and Conclusions of Law and Judgment on November 29, 1978. The Judgment recited that the suit was premature, and remanded the case to HHA for compliance with the procedural prerequisites for arbitration, including a valid determination of public use. Contrary to the claims of HHA (HHA Br. 10), its determination of public use for Wai-Kahala Tract H did not occur until October 20, 1978, and lots in that tract were not designated for acquisition until September 21, 1979. The Judgment was never appealed and became final. The *Wai-Kahala Tract "H"* case languished inactive; eventually, a stipulation for dismissal was entered on November 7, 1980.

Hence, the only matters in issue in *Wai-Kahala Tract "H"* were the authority of certain private plaintiffs to represent the Tract H lessees, and the HHA's compliance (or lack thereof) with the governing statute and regulations. No issue of the constitutionality of Chapter 516 was ever raised by any party and, indeed, could not have been inasmuch as the mandatory arbitration sought to be enforced was not a part of any condemnation under Chapter 516. Haw. Rev. Stat. § 516-51(b) (1976 repl.); *see also* HHA JS App. A131-A132 and text accompanying note 55, *supra*).

(2) *Midkiff* v. *Amemiya*, Civ. No. 47103:

This case involved the constitutionality of the residential rent control law, Haw. Rev. Stat. § 519-2, *not* Chapter 516. Trustees brought suit against state officials and individual Wai-Kahala Tract A lessees for declaratory relief on December 29, 1975. The complaint focused exclusively upon Tract A and the question of the constitutionality of limiting renegotiated lease rents through Section 519-2 (the complaint was amended on February 27, 1976, but only to add and delete certain individual Tract A lessees). No issue was raised as to Chapter 516 in the complaint, the amended complaint, or the answers filed by the state and the lessees respectively.

On June 29, 1978, the Circuit Court issued its Findings of Fact and Conclusions of Law upholding the constitutionality of Section 519-2. The Findings and Conclusions make clear that the case was concerned exclusively with the constitutionality of Section 519-2. Thereafter, during the pendency of an appeal, the case settled and was rendered moot. Trustees filed a Motion for Partial Dismissal of Appeal and Partial Vacation of Judgment on grounds of mootness on April 7, 1982, which was granted by Order No. 7294 filed by the Supreme Court on April 14, 1982. Reconsideration was denied by Order entered on April 16, 1982. Further proceedings were therefore restricted to the issue of attorneys' fees and costs. Judgment on Appeal was filed by the Supreme Court on May 18, 1982,

datory arbitration and exclusive valuation provisions of the statute.[68] With a single, inconsequential exception

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along with the Notice of Judgment on Appeal (the notice directed to the Circuit Court concerning final disposition of the appeal). Pursuant to the Notice of Judgment on Appeal, the Circuit Court entered its Order Dismissing Plaintiffs' Complaint as Moot on June 3, 1982. The case then had been finally concluded, without any resolution of the constitutionality of Section 519-2, much less any binding determination as to the validity of Chapter 516.

(3) *Hawaii Housing Authority* v. *Midkiff*, Civ. No. 63408 (Haw. Cir. Ct. Sept. 6, 1983) (the "Kamiloiki Valley" Case):

HHA did not file its complaint against Trustees until November 10, 1980, well after the District Court had entered its final judgment in this case and while this case was pending on appeal before the Court of Appeals. HHA clearly errs in contending that "the Kamiloiki Valley case * * * beg[a]n before this federal action was filed" (HHA Br. 11). A public hearing on the Kamiloiki tract was held a week before the federal complaint was filed, but not even a preliminary determination of public use was made by the HHA until March 30, 1979, much less any designation of lots for acquisition, which did not occur until October 17, 1980. HHA errs in its suggestion (HHA Br. 10) that Trustees could have litigated their constitutional rights before HHA in this case; the letter referred to by HHA was merely designed to give HHA notice of Trustees' intention to have their constitutional claims adjudicated before a competent court. As to the current status of the case, *see* note 69, *infra*.

(4) *Hawaii Housing Authority* v. *Castle*, 65 Haw. Adv. 465, 653 P.2d 781 (1982) and *Hawaii Housing Authority* v. *Brown*, No. 8489 (Haw. Nov. 10, 1982) (unpublished opinion):

Trustees were not a party to either suit. More importantly, both suits were filed in 1980 more than a year after Trustees filed this suit. Brown and his co-trustees of the King Lunalilo Trust, far from being a "major land-owning estat[e]" (HHA Br. 11), own the grandiose total of fifteen acres.

[68] The District Court issued its preliminary injunction on May 8, 1979 (HHA JS App. A77 *et seq.*) The first state condemnation actions involving Trustees were not filed against Trustees until September 21, 1979. *Hawaii Housing Authority* v. *Midkiff*, Civ. Nos. 59191, 59201, & 59202. All three suits were subsequently dismissed. The next state court condemnation suit still pending was not filed until May 7, 1980, a half year after the District Court filed its Amended Memorandum Decision, and just prior to Trustees' filing of their notice of appeal.

(*see* note 68, *supra*), all of the 25 condemnation suits currently pending against Trustees were filed subsequent to Trustees' appeal from the District Court's judgment, some as recently as July 15, 1983.

Trustees' proof that they, their Schools, and the schoolchildren they serve would be irreparably harmed unless these proceedings were stayed pending final disposition of this case convinced the Court of Appeals to recall its mandate for clarification after the District Court refused to grant Trustees an injunction. *Midkiff* v. *Tom*, No. 80-4368 (Aug. [illegible] 1983) slip op. 1-2 (*see generally* No. 83-236 Motion to Affirm 7-10). Pending issuance of that revised mandate, the court enjoined HHA, intervenors, and related parties from pursuing any ongoing or future condemnation suits under Chapter 516 (slip op. 2).[69] Briefing and oral argument have now been completed. No decision has yet been rendered.[70]

SUMMARY OF ARGUMENT

1. *Abstention.* The Court of Appeals was manifestly correct in holding that the doctrine of abstention was no bar to the clear jurisdiction of the federal courts to hear this case. The only two doctrines asserted in this Court are *Pullman* and *Younger*. HHA alone argues *Pullman*, but after originally raising the matter in its answer, it

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[69] Of the 25 cases, only one, the "Kamiloiki Valley" Case, has even been partially tried. Findings of Fact and Conclusions of Law were filed on September 6, 1983 (Portlock Br. Ex.), and Judgment was filed on September 29, 1983. Because of post-judgment motions, Trustees' time to file a notice of appeal has not yet expired. Inasmuch as the Court of Appeals' temporary injunction pending issuance of the revised mandate only affects appellants, and not the state courts, HHA errs in its assertion that the Court of Appeals' injunction prevents state court appellate review (HHA Br. 11).

[70] Without awaiting the issuance of that revised mandate, appellants twice sought, unsuccessfully, a stay of the Court of Appeals' Order from Justice Rehnquist, acting as Circuit Justice for the Ninth Circuit. *Hawaii Housing Authority* v. *Midkiff*, No. A-113 (1983) (in Chambers); *Hawaii Housing Authority* v. *Midkiff*, No. A-278 (1983) (in Chambers).

thereafter affirmatively argued that *Pullman* did not apply. The doctrine has therefore been waived. Moreover, *Pullman* is appropriate only when there are uncertain questions of state law that should be resolved in the state courts. Here, no such questions are present. On the Public Use issue, for example, the statute could not possibly be interpreted in any way except as it reads. Apparently recognizing this, HHA's argument is that the state courts should be allowed to rewrite the statute—a theory foreign to the *Pullman* doctrine.

Younger has also been waived. HHA asserts the doctrine for the first time in this Court, having sought a decision on the merits in both federal courts below. A ruling for HHA would allow states to seek a federal resolution until it became clear they would lose, and then claim abstention for the first time in this Court. The private appellees also failed to urge *Younger* below and, in any event, should not be able to force abstention where the state has decided that its interests are most appropriately presented in federal court. Moreover, *Younger* would not be applicable even if properly asserted. Trustees' complaint was filed in federal court months in advance of any state court condemnation action. By the time there was a pending state action, there had been significant, substantive proceedings on the merits in federal court: for example, a TRO and preliminary injunction had been issued and a motion for summary judgment filed. The Hawaii statute expressly provides that administrative proceedings are separate from any condemnation action, and, in any event, Trustees' constitutional claims could not have been adjudicated in those proceedings.

2. *Public Use.* The Court of Appeals correctly held that the Hawaii statute violates the Public Use requirement of the Fifth and Fourteenth Amendments by simply transferring property from *A* to *B*. The statute is unprecedented in its reach and sweep. In no prior case have all of the following factors been present: (a) the takings may only be initiated by the very people who will receive

the property; (b) the takings are paid for by the private recipients of the transfer; (c) the only property taken consists of the ground lots upon which the new owners already own houses; (d) the takings transfer property from one private party to another; (e) the takings effect no change in the use or usability of the property or its environs; (f) there is no continuing government oversight, regulation, or control once the transfer to other private parties is completed; and (g) there is no obligation on the part of the parties receiving the property to conform to any predetermined plan for its use.

When all of these factors are present, the courts need not "second guess" a legislature or its "findings"; the private nature of the taking is apparent upon the face of the statute. But even if this argument were rejected, the courts are not mere passive observers of the legislative role. The purported legislative justifications for the takings here are shown to be nothing more than mere rationalizations.

Berman v. *Parker*, 348 U.S. 26 (1954), is not to the contrary. While some of its language is broad, the case itself was a slum clearance case in which at least seven factors were present that are not present here. If the Court believes that the *Berman* dicta does control, that dicta should be reexamined.

3. *Due Process and Contract Clauses.* Other independent grounds—which the Court of Appeals did not have to reach—confirm the statute's constitutional invalidity. The statute denies Trustees' due process rights because its means bear no rational connection to any legitimate public purpose, and it impermissibly delegates legislative power to private lessees who are personally and financially self-interested and not accountable to the affected landowners or the general public. Furthermore, Chapter 516's retroactive application to Trustees' preexisting lease contracts not only impairs but destroys the obligations of those lease contracts in violation of the Contract Clause.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY RULED THAT ABSTENTION WOULD HAVE BEEN IMPROPER.

A. *Pullman* Abstention Is Inappropriate Because It Has Been Waived, and the Federal Constitutional Questions Are Clearly and Unavoidably Presented.

Of all the appellants, only HHA argues *Pullman* abstention, but its argument has been waived. HHA raised this matter in its answer, but thereafter either failed to assert it at all or affirmatively argued that *Pullman* did *not* require abstention (JA 122-125). In any event, HHA's argument must fail.[71]

It is well settled that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule" (*Colorado River*, 424 U.S. at 813), and "sanctions • • • escape [from immediate decision] only in narrowly limited 'special circumstances.'" *Kusper* v. *Pontikes*, 414 U.S. 51, 54 (1973) (citation omitted). In that regard, "a state's power of eminent domain no more justifies abstention than the fact that [the case] involves any other issue related to sovereignty." *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 192 (1959). It is equally clear that one of those "special circumstances," *Pullman* abstention, is appropriate only where a state court resolution of an uncertain question of state law may moot or substantially alter the posture of a federal

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[71] HHA and Portlock made passing references to *Burford* and *Colorado River* in their Jurisdictional Statements and Briefs on the merits, but do not rest upon these doctrines (*see* HHA Br. 36-46; Portlock Br. 13-17). All appellants have now clearly waived any such claim. Furthermore, neither doctrine is applicable here. *See* No. 83-236 Motion to Affirm 22-24 & n.33. In addition, application of either doctrine here is inconsistent with the intent of the Congress that adopted Section 1983. *Cf. Patsy* v. *Florida Board of Regents*, 457 U.S. 496 (1982); *Mitchum* v. *Foster*, 407 U.S. 225, 239-242 (1972); *McNeese* v. *Board of Education*, 373 U.S. 668, 671-673 (1963); *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961).

constitutional question.[72] Where the applicable state law is clear, even though never before interpreted by a state court, and "the naked question * * * is whether the Act on its face is unconstitutional," *Pullman* abstention is unwarranted. *Wisconsin* v. *Constantineau*, 400 U.S. at 439; *see also Harman* v. *Forssenius*, 380 U.S. 528, 534-535 (1965).

No uncertain state-law question is present here. As the Court of Appeals observed, Haw. Rev. Stat. § 516-83 (a) (12)[73] is "perfectly clear" and "unambiguously states" that "'[t]he use of the power to [sic] eminent domain [under Chapter 516] is for a public use and purpose' * * *" (HHA JS App. A2-A4 n.1 (quoting § 516-83(a) (12)). The state legislature could not have stated its intention more clearly. Only by "perform[ing] a remarkable job of plastic surgery upon the face of the statute" (*Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 153 (1969)) could anyone construe it in another manner. Accordingly, the Court of Appeals' conclusion that abstention was unjustified is inescapable.[74]

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[72] *E.g.*, *Babbit* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 306 (1979); *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 100 n.3 (1978); *Zablocki* v. *Redhail*, 434 U.S. 374, 379-380 n.5 (1978); *Wisconsin* v. *Constantineau*, 400 U.S. 433, 438-439 (1971); *Zwickler* v. *Koota*, 389 U.S. 241, 249-251 (1967).

[73] Section 516-83(a) (12) provides:

> The use of the power to [sic] eminent domain to condemn the fee simple title to residential land and the payment of just compensation therefor for the purpose of making the fee simple title thereto and the use thereof available for acquisition by people who are lessees under long-term leases of such land and on which such land their homes are situated is for a public use and purpose.

To the same effect are Haw. Rev. Stat. §§ 516-83(a) (10), 516-83(a) (11), (13), and 516-83(b).

[74] No appellant has ever cited any other provision of Chapter 516 suggesting that Section 516-83(a) (12) does not mean exactly what it says, or any provision of that *existing* Act—rather than ones Hawaii has never enacted—in any way negating or modifying the plain language of Section 516-83(a) (12). In fact, any such contention would be plainly inconsistent with HHA's insistence that

HHA argues that (1) the state courts should be permitted to remedy the federal constitutional flaws in Chapter 516 by adding provisions thereto that the state legislature omitted (HHA Br. 38-40), or (2) the state courts should be permitted to invalidate the Act on state constitutional grounds (HHA Br. 40-41 n.84).[75] Neither position merits serious consideration.[76]

HHA's first argument is not that a state court could *construe* Chapter 516, as currently written, in a manner that would moot or alter the federal constitutional questions involved here. Rather, HHA's argument is that *Pullman* abstention is appropriate to allow the state courts to *redraft* Chapter 516 to rehabilitate its constitutional deficiencies. That contention is untenable. Just as *Pullman* does not require abstention pending the enactment of a new statute by the state legislature, so too *Pullman* does not require abstention pending the *reconstruction* of an already-existing state law by the state courts. *See Procunier* v. *Martinez*, 416 U.S. 396, 403-404 (1974);

"[t]he legislature concluded * * * that the Act would realize public purposes and put land to public use" (HHA JS 4 (footnote omitted); *see* HHA Br. 6).

[75] In fact, HHA has shifted horses with respect to this argument. In its Jurisdictional Statement, HHA argued that Chapter 516 was clear on its face and that abstention was appropriate only because of the possibility of a state court decision invalidating Chapter 516 on state constitutional grounds (HHA JS 24-25). For the reasons given in our Motion to Affirm in No. 83-236, at 13-14, and in the text, that argument must fail. By contrast, HHA has now recognized that Chapter 516 cannot pass muster as written, and has sought abstention under *Pullman* to permit the state courts "to conclude the final stage of the state's legislative process * * *" (HHA Br. 40)—a virtual admission that the supposed findings contained in Chapter 516 themselves cannot sustain the Act's constitutionality.

[76] Portlock's recent, heavy reliance upon *Kaiser Steel Corp.* v. *W.S. Ranch Co.*, 391 U.S. 593 (1968), is clearly misplaced. In that diversity action, this Court's six-member per curiam decision to abstain in favor of a pending state court proceeding rested upon the uncertain interface of the state's water allocation laws with its eminent domain power. *Id.* at 594.

Wisconsin v. *Constantineau*, 400 U.S. at 439.[77] *Pullman* envisions only a "state court *construction*" of a law already on the books (*Zwickler* v. *Koota*, 389 U.S. at 250 (emphasis added)), and where that interpretation "cannot narrow [the act's] allegedly indiscriminate cast" (*id.*), *Pullman* abstention is inappropriate. *See, e.g., Harman* v. *Forssenius*, 380 U.S. at 534-535, and cases cited in note 72, *supra*.[78]

HHA's second argument is equally unavailing. This Court has twice rejected the argument that *Pullman* requires abstention, notwithstanding an unambiguous state statute, simply because of the hypothetical possibility that state courts might invalidate the statute under a parallel provision of the state, rather than the federal, Constitu-

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[77] In fact, the state legislature deliberately omitted the antitrust predicate HHA now seeks to add to the Act (*see* note 42, *supra*).

[78] HHA's argument must also fail for three additional reasons.

First. By seeking a state court construction of Chapter 516 simply to assure that the state courts can supplement the job of the state legislature—a proposition which, of course, would justify abstention in *every* case—HHA is really asking for nothing more than the opportunity initially to litigate the constitutionality of Chapter 516 in the state courts. This Court has clearly ruled, however, that *Pullman* abstention is never justified simply to provide the state courts with the first opportunity to rule on a federal constitutional question. *See, e.g., Zwickler* v. *Koota*, 389 U.S. at 250-251 & n.14, and cases cited therein.

Second. HHA suggests that only "a series of localized as applied" adjudications would be sufficient fully to clarify the meaning of Chapter 516 (HHA Br. 38). But this Court has often recognized that the need for multiple separate adjudications to construe a statute renders *Pullman* abstention inadvisable. *See, e.g., Procunier* v. *Martinez*, 416 U.S. at 401 n.5; *Baggett* v. *Bullitt*, 377 U.S. 360, 378 (1964).

Third. Because the *Pullman* doctrine is based upon equitable considerations (312 U.S. at 500-501), factors such as the delay and injury that could be suffered by the federal plaintiff and the state's failure to raise this doctrine in the lower courts should be considered before ordering abstention. *See, e.g., Harman* v. *Forssenius*, 380 U.S. at 537; *Baggett* v. *Bullitt*, 377 U.S. at 378-379; *Hostetter* v. *Idlewild Bon Voyage Liquor Co.*, 377 U.S. 324, 329 (1964). Here, those considerations plainly militate against abstention.

tion. *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 598 (1976); *Wisconsin* v. *Constantineau*, 400 U.S. at 437-439. Under the contrary rule, *Pullman* abstention would be appropriate in *every* case because, as HHA admits (HHA Br. 40-41 n.84; *see* HHA JS 24 & n.61), state courts can always invalidate state laws on state constitutional grounds, thereby "convert[ing] abstention from an exception into a general rule." *Examining Board*, 426 U.S. at 598 (footnote omitted).[79] Appellants' argument is thus at odds with *Examining Board* and *Constantineau*.

Finally, the fact that a state court is not likely either to interpret Chapter 516 in some unique way or to invalidate it under the state Constitution is borne out by the only state court decision on the subject, *Hawaii Housing Authority* v. *Midkiff*, Civil No. 63408 (Haw. Cir. Ct. Sept. 6, 1983).[80] While the state Circuit Court disagreed with the Court of Appeals regarding the constitutionality of Chapter 516,[81] it did not interpret the statute differently, nor did it find the Act in conflict with the Hawaii Constitution.[82]

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[79] For instance, in *Examing Board* the Court ruled that the presence of an equal protection guarantee in the Puerto Rico Constitution did not require abstention to avoid decision under the Fourteenth Amendment's Equal Protection Clause. 426 U.S. at 598. Here, the Public Use provision of the Hawaii state Constitution is also not a specialized matter (*id.*), but is similar to the federal provision (*see* HHA JS App. A23 (Poole, J.)).

[80] *See* Portlock Br. Ex. A-1 *et seq.*

[81] This decision (*see* notes 67 ¶ (3) and 69, *supra*) was rendered well after the Court of Appeals had ruled, and entirely ignored the Court of Appeals' opinion. Its findings of fact and conclusions of law contain no reference whatsoever to the Ninth Circuit's judgment or opinions declaring the condemnation provision of Chapter 516 facially unconstitutional, nor any reference to Trustees' defense that that judgment was *res judicata* upon the federal constitutional issues.

[82] Moreover, none of the reasons given by the dissent in the Court of Appeals for *Pullman* abstention can pass muster.

First. The argument that the federal constitutional question need not be reached if the state can regulate the lessees' post-acquisition use of their new leaseholds hypothecates state-court

B. *Younger* Has Been Waived and in Any Event Does Not Require Abstention.

1. HHA has clearly waived any *Younger* claim. HHA did not rely upon *Younger* in its answer to Trustees' complaint (JA 61-65), in any paper it filed with the District Court (JA 81-86, 99-100, 105), in its initial brief filed with the Court of Appeals (JA 115-116), in its supplemental post-oral argument brief filed with that court (JA 131-137)—a brief filed in response to the Court of Appeals' specific request that the parties identify their positions on abstention (*see* HHA JS App. A30 & n.7 (Poole, J.))—or in its petition for rehearing and suggestion for rehearing *en banc*. The first time HHA invoked *Younger* was in its Jurisdictional Statement filed with this Court. There is no question that the state can waive a *Younger* claim,[51] and HHA's actions in this regard clearly satisfy

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interpretations of a statute Hawaii has *never* enacted. No provision of the *existing* Act regulates lessees' post-acquisition use—a point which was noted by the Court of Appeals' majority (*see, e.g.*, HHA JS App. A17-A18; *id.* A32-A33, A36 (Poole, J.)) and not denied by the dissent. *Pullman* does not require a federal court to await a state court interpretation of an as-yet-unenacted state law before considering a federal constitutional claim.

Second. The "possibility of a constitutional construction of the statute" (HHA JS App. A48) is based upon the dissent's interpretation of the federal Constitution, *not* Chapter 516 (HHA JS App. A48, referring to dissent at A53-A60). A federal court may not abstain under *Pullman*, however, simply for that reason. *Zwickler* v. *Koota*, 389 U.S. at 250-251 & n.14.

Third. The dissent's distinction between cases involving racial or gender discrimination and land use (HHA JS App. A48-A49) is based entirely upon an earlier *dissenting* opinion by the same author (*id.* at A49), is contrary to well-established precedent (*e.g.*, *Harrison* v. *NAACP*, 360 U.S. 167 (1959); 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4242, at 465 (1978) ("it is clear that there is no rule to this effect")), and overlooks the fact that Trustees too have raised a claim protected by the Fourteenth Amendment.

[51] *See Kolender* v. *Lawson*, 103 S. Ct. 1855, 1857 n.3 (1983); *Swisher* v. *Brady*, 438 U.S. 204, 213 n.11 (1978); *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 480 (1977); *Sosna* v. *Iowa*, 419 U.S. 393, 396-397 n.3 (1975).

even the most exacting tests for waiver—either "an intentional relinquishment or abandonment of a known right or privilege" (*Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)) or a "deliberate bypass" of the opportunity to litigate a matter in state court. *Fay* v. *Noia*, 372 U.S. 391, 438 (1963). Therefore, HHA may not raise this issue for the first time in this Court. *Vance* v. *Universal Amusement Co.*, 445 U.S. 308, 315 n.11 (1980) (*per curiam*).[84]

Furthermore, HHA affirmatively argued below that *Younger* was *inapplicable* and asked both the District Court and the Court of Appeals to reach the merits of Trustees' federal claims (JA 99-100, 115-116, and 131-135).[85] HHA may not take a contrary position now. This Court has consistently refused to sanction a Janus-faced approach by the government of lulling the lower federal courts into believing that a potentially dispositive threshold question was not properly before them, only to turn around and present the contrary argument for the first

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[84] Portlock is also a latter-day standard bearer in this respect. Portlock did not raise *any* abstention argument in its answer, any pleading it filed with the District Court, or its initial brief with the Court of Appeals (JA 68-73, 89-90, 96-98, 110-111). (In the initial stages of this suit, Portlock lessees were represented by the same counsel as the Wai-Kahala Tract H *et al.* intervenors.) Thereafter, Portlock only claimed that *Younger* was applicable in a supplemental post-oral argument memorandum. At no time did Portlock claim that any other abstention doctrine was apposite.

[85] Indeed, HHA's about-face strategy has continued even in this Court. For instance, in its Jurisdictional Statement HHA conceded that there were no ongoing state judicial proceedings pending at the time Trustees filed their complaint in the District Court, and observed that this fact distinguished this case from *Ahrensfeld* v. *Stephens*, 528 F.2d 193 (7th Cir. 1975), in which the Circuit Court held that *Younger* was applicable to ongoing, state-initiated condemnation suits (HHA JS 26). In its brief on the merits, however, HHA has argued that there were ongoing state court proceedings at the time Trustees filed their complaint (HHA Br. 42-43). While that assertion is incorrect as a matter of fact and law, it does typify HHA's quite recent approach to abstention.

time to this Court.[86] Certainly, Congress could not have intended to subject plaintiffs, or the federal courts, to any such gambol; indeed, Congress adopted 42 U.S.C. § 1983, upon which Trustees have relied (JA 46), precisely to ensure that the federal courts could protect persons against state machinations of this kind (*see* note 71, *supra*). Accordingly, there is no reason to permit HHA to toy with Trustees or the courts below in that fashion. A ruling for appellants on this issue would be an open invitation to future litigants to reserve all abstention arguments until after an adverse result in the Court of Appeals and then raise abstention for the first time in petitions for rehearing or in this Court. For this reason as well, HHA should not be permitted to shift positions, as if dancing a quadrille, to invoke *Younger* now.[87]

There is also no good reason to relieve HHA from its waiver. In light of the state's oft-acknowledged concern (*see* note 108, *infra*) that Chapter 516 would be challenged under the Eminent Domain Clause Public Use requirement (as the state itself once did, *see* note 51, *supra*), HHA was well aware that an aggrieved party would raise this claim in federal courts.[88] In fact, HHA has conceded that it knew, before this suit was filed, that Trustees would do so (HHA Br. 10; HHA JS 7). Nonetheless, the only abstention doctrine HHA even briefly raised in either court below was *Pullman*; HHA never argued that *Younger* was applicable.

We submit that the states, and their agencies, such as HHA, have an affirmative duty at the outset of litigation

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[86] *E.g.*, *Steagald* v. *United States*, 451 U.S. 204, 208-211 & n.5 (1981); *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975).

[87] In fact, because HHA argued to the Court of Appeals that abstention was inappropriate on any ground (JA 131-137), HHA also may not now contend that abstention is appropriate under *Burford*, *Pullman*, or *Colorado River*.

[88] It also cannot be said that HHA or the state "lacked the tools to construct their [*Younger*] claim." *Engle* v. *Isaac*, 456 U.S. 107, 133 (1982) (footnote omitted). By the time Trustees filed suit, *Younger* was eight years old. *Cf.* 456 U.S. at 131-133.

to evaluate and determine the state's interests in this respect. If these interests compel decision by the state courts, the state has an obligation to assert its *Younger* claim at the first opportunity, so that the question of abstention can be decided before the entire federal judicial apparatus is set in motion on the merits. Permitting the state to withhold a *Younger* claim until after an unfavorable ruling on the merits would entail unjustified institutional costs.[89] That is particularly true where the state withholds reliance upon *Younger* until seeking review in this Court. *Younger* does not support that result.

In a parallel context, the Court has refused to permit the state to protect final judgments in criminal cases by invoking *Wainwright* v. *Sykes* for the first time in this Court. *See, e.g., Estelle* v. *Smith*, 451 U.S. 454, 468 n.12 (1981); *Jenkins* v. *Anderson*, 447 U.S. 231, 234 n.1 (1980). The state interests underlying *Sykes* are at least equal to, if not greater than, those underlying *Younger*. *Compare Engle* v. *Isaac*, 456 U.S. at 126-129, *and Sykes*, 433 U.S. at 89-91, *with Younger*, 401 U.S. at 43-49.[90] In other parallel contexts, the Court has followed the same

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[89] In *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), the Court recognized that forcing a state criminal defendant to assert his federal claims at trial served a variety of institutional interests: it contributed to the accuracy and finality of judgments, prevented a party from "sandbagging" a state trial court by withholding a potentially dispositive matter until after an adverse judgment, conserved scarce judicial resources, and promoted respect for state court judgments entered after a trial on the merits. 433 U.S. at 88-91. Those considerations are fully applicable in this parallel context.

[90] The interference with the state's surpassing interest in enforcing its criminal laws, the displacement of the state court criminal process, the elimination of finality of criminal judgments, and the freeing of clearly guilty but unretriable prisoners (*see, e.g., Engle* v. *Isaac*, 456 U.S. at 126-129 & nn.31-34) all suggest that the state has a greater interest in preserving *successful* judgments in *criminal* cases than in voiding *adverse* judgments in *civil* cases.

approach.[91] Requiring HHA to invoke *Younger* in the lower federal courts is entirely appropriate.

2. The considerations which led this Court to rule that an amicus curiae should not be permitted to invoke *Younger* against the state's wishes (*Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. at 480) also justify a rule denying private parties the right to invoke *Younger* abstention over the state's decision to litigate a case in federal court. The essence of the *Younger* doctrine and the ancillary rule that the state may waive that doctrine is a recognition that the state rather than a private party is entitled to choose the forum in which to litigate the constitutionality of its laws. HHA elected to litigate this case on the merits in federal court, and none of the intervenors should now be permitted to undermine that decision.

3. Waiver problems notwithstanding, the facts here clearly militate against *Younger* abstention.

(a) The Court of Appeals found (HHA JS App. A4-A6 n.1) that there were no ongoing state judicial proceedings at the time this suit was filed.[92] That finding

[91] For example, the Court has noted that "[t]o some extent, the practical considerations supporting" the *Younger* doctrine "are similar to those that underlie the requirement of exhaustion of administrative remedies." *Schlesinger* v. *Councilman*, 420 U.S. 738, 756 (1975). And it is hornbook law that the government's failure to assert that claim will be treated as a waiver. *See, e.g., Mathews* v. *Diaz*, 426 U.S. 67, 75-77 (1976).

The Court has also drawn a parallel between the comity interests underlying *Younger* and those underlying the rule that a state prisoner must exhaust state judicial remedies before applying for federal habeas corpus. *Preiser* v. *Rodriguez*, 411 U.S. 475, 491 (1973). Several Circuit Courts have ruled that the state's failure to contest a prisoner's exhaustion constitutes a waiver of that claim. *Lamb* v. *Jernigan*, 683 F.2d 1332, 1335 n.1 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 1276 (1983); *Hopkins* v. *Jarvis*, 648 F.2d 981, 983 n.2 (5th Cir. 1981); *Brown* v. *Fogel*, 387 F.2d 692, 695 (4th Cir. 1967), *cert. denied*, 390 U.S. 1045 (1968).

[92] That factual conclusion is also a complete answer to appellants' argument that the Court ought to adopt the holding in *Ahrensfeld* v. *Stephens*, *supra* (state court condemnation proceedings pending at the time the plaintiff filed suit in federal court.)

was plainly correct: Trustees filed this suit on February 28, 1979, and HHA did not file its first suit to condemn Trustees' property until September 21, 1979, almost seven months later (note 68, *supra*).[93] *Younger* therefore did not bar this suit. *Zablocki* v. *Redhail*, 434 U.S. at 379-380 n.5; *Steffel* v. *Thompson*, 415 U.S. 452, 462-463 (1974).[94]

HHA argues that the targeting[95] of Trustees' lots for mandatory arbitration proceedings at the time Trustees filed suit is sufficient to trigger *Younger* abstention (HHA Br. 44-45). That argument overlooks Section 516-51(b) of Chapter 516 (1976 repl.) which, at all pertinent times, expressly provided that "mandatory arbitration shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain" (page 15, *supra*).[96] Under state law, these proceedings are neither themselves, nor part of, a judicial proceeding, and

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[93] HHA expressly acknowledged in the Court of Appeals that "no state proceeding under the disputed statute involving the Trustees and HHA was pending at the time of the filing of Trustees action * * *" (JS 133).

[94] If this Court were to take seriously HHA's argument that state court condemnation proceedings are simply "the final stage of the state's legislative process" (HHA Br. 40), then no state court condemnation suit could *ever* trigger *Younger*, because that doctrine is limited to "state judicial proceedings * * *." *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100, 112-113 (1981).

[95] HHA confuses "designation" of lots for acquisition, which for Tract H did not occur until September 21, 1979, well after the filing of the federal complaint, with the preliminary (and rote) determination of effectuation of public use, a condition precedent to designation. *See* Haw. Rev. Stat. § 516-22 and pp. 8-10, *supra*. In any event, Judge Poole's conclusion (HHA JS App. A28-A29 n.5) that "the public hearings before the Hawaii Housing Authority bear none of the attributes of a judicial proceeding such as that found in *Middlesex*" is entitled to substantial deference (*cf. Bishop* v. *Wood*, 426 U.S. 341, 346 (1976)) and is clearly correct.

[96] Because Section 516-51(b) is clear on its face, HHA's suggestion (HHA Br. 45) that *Pullman* abstention is appropriate in this respect must fail for the reasons given above (pp. 25-29) regarding *Pullman* abstention.

therefore do not engage *Younger*. *See Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 433 (1982); *McNary*, 454 U.S. at 112-113.[97]

Furthermore, *Younger* contemplates that the state proceeding to which abstention would apply is both a constitutional and competent forum for adjudication of a party's federal claims. *See Middlesex*, 457 U.S. at 432; *Gibson* v. *Berryhill*, 411 U.S. 564, 577 (1973). The District Court's invalidation of these mandatory arbitration proceedings as an unconstitutional taking of Trustees' property without just compensation (JA 106-108)—a judgment which HHA did not appeal—demonstrates that these administrative proceedings do not satisfy the first criteria. Moreover, HHA also lacked the authority to adjudicate Trustees' constitutional claims. Chapter 516, in this respect, simply provides HHA[98] with the statutory authority to exercise the state's eminent domain power under other provisions of Hawaii law.[99] Those other provisions, in turn, expressly provide that any question of public use shall be decided by the courts.[100] Hence,

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[97] HHA's reading of *Middlesex* is in error. While *Middlesex* acknowledged that the "civil," "criminal," or "quasi-criminal" label attached to the proceeding in question is not dispositive (457 U.S. at 433 n.12), the Court made clear that the state law characterization of the proceeding as "judicial" or not *was* dispositive. *Id.* at 432-434. *Middlesex* ruled that New Jersey state bar disciplinary proceedings were judicial because, under state law, "filing a complaint with the local Ethics and Grievance Committee 'is in effect a filing with the [state] Supreme Court * * *.'" *Id.* at 433 (quoting *Toft* v. *Ketchum*, 18 N.J. 280, 284, 113 A.2d 671, 674, *cert. denied*, 350 U.S. 887 (1955)). Here, state law clearly provides that mandatory arbitration proceedings are not judicial. Designation is therefore akin to the extrajudicial process that the Court found insufficient to trigger *Younger* in *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 3 & n.1 (1974), and *Fuentes* v. *Shevin*, 407 U.S. 61, 71 & n.3 (1972).

[98] Haw. Rev. Stat. §§ 356-18 and 516-23.

[99] Found at Haw. Rev. Stat. Chapter 101.

[100] Haw. Rev. Stat. § 101-34. In fact, Chapter 516 originally gave the Hawaii Supreme Court original jurisdiction over all constitu-

state law clearly establishes that these mandatory arbitration proceedings also fail the second prerequisite for *Younger*.

(b) There still were no ongoing state judicial proceedings at the time the District Court granted Trustees a temporary restraining order and, even later, a preliminary injunction restraining the mandatory arbitration and valuation components of Chapter 516.[101] That injunction afforded Trustees substantial relief on the merits of their complaint. It eliminated forced participation in and payment for mandatory arbitration, which could have fixed, well in advance of the actual taking, the compensation Trustees would ultimately receive. That ruling also eliminated exclusive use of valuation formulae which would have given Trustees less than fair market value for their property. By that point, "proceedings of substance on the merits ha[d] taken place in the federal court." *Hicks* v. *Miranda*, 422 U.S. 332, 349 (1975). *See Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 930-931 (1975) (*Younger* inapplicable where District Court had issued a TRO prior to any state court proceedings).[102]

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tional challenges to the Act (note 51, *supra*). When this provision was repealed in 1975, the legislature did not substitute HHA for the Hawaii courts.

In this respect, Hawaii law parallels federal law, under which federal administrative agencies lack authority to adjudicate federal constitutional claims. *See Johnson* v. *Robinson*, 415 U.S. 361, 368 (1974); *Public Util. Comm'n* v. *United States*, 355 U.S. 534, 539 (1958); K. Davis, *Administrative Law Treatise* § 26.6, at 434-435 (2d ed. 1983).

[101] HHA JS App. A2-A4 n.1; *id.* at A30 (Poole, J.); *id.* at A101-A104; *see* JA 14.

[102] HHA, again, acknowledged this fact before the Court of Appeals: "no such state proceeding [under the disputed statute involving Trustees and HHA] was commenced before proceedings of substance on the merit [sic] took place in the District Court below" (JA 133).

HHA's current argument that these proceedings do not qualify under *Hicks* (HHA Br. 43) fails to appreciate the context of the Court's ruling in that case. By the time theatre owners filed their

Therefore, *Younger* was no bar to this suit, because actions subsequently filed in state court do not oust the federal courts of jurisdiction under *Younger*. *See, e.g., Town of Lockport* v. *Citizens for Community Action*, 430 U.S. 259, 264 n.8 (1977).

II. THE COURT OF APPEALS CORRECTLY RULED THAT CHAPTER 516 VIOLATED THE PUBLIC USE REQUIREMENT OF THE EMINENT DOMAIN CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS.

A. Introduction.

As relevant here, the Fifth Amendment provides that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken *for public use*, without just compensation." The issue at the heart of this case involves the meaning of the Public Use requirement of the above clauses,[103] and the extent to which that requirement limits

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federal suit, two theater employees had been criminally charged because of allegedly obscene films, and a state trial court had declared the films to be obscene and ordered them seized. The Court found that "[the plaintiffs] had a substantial stake in the state proceedings," and, "[o]bviously, their interests and those of their employees were intertwined"; plaintiffs' lawyers even represented their employees in the state court suit. 422 U.S. at 348-349. The Court ruled that *Younger* barred the federal suit because it would have interfered with the ongoing state proceeding in which plaintiffs had as much an interest as the defendants and were, realistically speaking, parties themselves. In other words, because the federal plaintiffs were essentially already parties to that state proceeding, their federal suit was filed second, not first. Highlighting that posture was the fact that the federal plaintiffs were charged in state court the day after they served their federal complaint, "prior to [the defendants'] answering the federal case and prior to any proceedings whatsoever before the three-judge court." *Id.* at 350.

In that context, the Court ruled that it would "trivialize" *Younger* to treat plaintiffs' successful race to the courthouse as eliminating *Younger*. The facts here are materially different (*see* pp. 15-18, *supra*).

[103] The Public Use requirement is part of the Eminent Domain Clause of the Fifth Amendment, and is applicable to the states

legislative power. In that regard, it is important to recognize at the outset four indisputable propositions that must necessarily guide the Court's analysis.

First, it cannot be denied that the Founding Fathers must have intended the Public Use requirement to play some role in federal constitutional law.[104] *Second*, it must be true that the Public Use requirement imposes some limit on governmental power.[105] *Third*, it must also be true that the Public Use requirement limits the government's authority to effect a "taking," rather than limiting the guarantee of "just compensation" for whatever takings are lawful.[106] *Fourth*, the text of the Public Use

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through the Due Process Clause of the Fourteenth Amendment. *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. 226 (1897).

Hereafter, we shall use the term "Eminent Domain Clause" to refer to the entire Clause, "Public Use requirement" to refer only to the italicized portion, "Taking provision" to refer to the first portion of the Eminent Domain Clause, and "Just Compensation requirement" to refer to the last portion of that Clause.

[104] Because "it is a constitution we are expounding" (*McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)), which "states or ought to state not rules for the passing hour, but principles for an expanding future" (B. Cardozo, *The Nature of the Judicial Process* 83 (1921); *see, e.g.*, *Weems* v. *United States*, 217 U.S. 349, 378 (1910)), "[i]t cannot be presumed that any clause in the constitution is intended to be without effect * * *." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 150 (1803). Any interpretation of the Public Use requirement which, as a legal or practical matter, treats the requirement as if it has no effect must therefore be rejected. Hence, we can safely put to one side HHA's suggestion (HHA Br. 34) that the Public Use requirement states nothing more than kind advice.

[105] The fundamental purpose of the Bill of Rights was to place certain principles that the Founders believed were necessary to a free society beyond the reach of the majoritarian political process. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 579 (1980) (plurality opinion of Burger, C.J.). The Public Use requirement, by its very existence, is manifestly one of those rights.

[106] It is inconceivable that the Public Use requirement instead limits the Just Compensation requirement, and thereby guarantees just compensation in only those instances in which a taking is for a

requirement necessarily denies the government the authority to condemn one person's private property for the purely private use and benefit of another.[107]

If the Court accepts those propositions, then the condemnations authorized by Chapter 516 must be held unconstitutional as serving only the private use and benefit of the lessees. That statute, without historical precedent or contemporary analogue, employs the state's power of eminent domain—a power once described as "despotic" and unjustified "except in urgent cases, or cases of the first necessity" (*Vanhorne's Lessee* v. *Dorrance*, 2 U.S. (2 Dall.) 304, 311 (1795) (Patterson, J., seriatim opinion))—for no reason other than to take Trustees' reversionary interest in leaseholds for transfer to lessees who themselves apply and pay for that interest. Indeed, the condemnations authorized by Chapter 516 constitute what must be the paradigm of a purely private transfer of one party's private property for the exclusive use and benefit of another private party.[108]

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public, rather than private, use. That interpretation would render the Just Compensation requirement virtually worthless, transform the government's condemnation authority into little more than a weapon of arbitrary oppression, and nullify the purpose of the Eminent Domain Clause of assuring that no person is forced to bear the entire brunt of governmental condemnations. *See, e.g., Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163 (1980); *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 123 (1978); *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). *See also* Epstein, *Not Deference, But Doctrine: The Eminent Domain Clause*, 1982 Sup. Ct. Rev. 351, 365.

[107] Any other interpretation of the constitutional text is flatly inconsistent with the Drafters' express use of the term "public" to describe the types of uses recognized as constitutionally valid. As Chief Justice John Marshall once put it, "the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824).

[108] Even HHA has admitted the novelty of Chapter 516 as an effort to accomplish supposed land use reform, stating that "[t]here were and are no clear-cut precedents in American law to define the

Appellants' defense of this transfer rests on the proposition that the Public Use requirement merely obliges the legislature to engage in a utilitarian calculus, at whatever level of abstraction the legislature may choose, that is not subject to judicial oversight.[109] Under appellants' theory, no condemnation is ever per se forbidden—even one avowedly done simply to make *B* happier by giving him *A*'s property—and the redistribution of property from *A* (who has more) to *B* (who has less) for that reason alone is *itself* a legitimate "public use."

The rule appellants espouse would effectively excise the Public Use requirement from the text of the Constitution. A legislature bent on condemning a party's property can always conclude that doing so will augment the public weal. And that, of course, is particularly true where, as here, the legislature specifically intends to take one party's property to satisfy the desires of a numerically-larger and, hence, politically-more-powerful, group of citizens. In short, the basic constitutional issue presented by these appeals is whether the Public Use requirement is merely precatory so that a state's taking of private property is uninhibited by that provision and unreviewable in the courts.

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specific rights of the respective parties." Hawaii Housing Authority, *1975-1976 Annual Report* 9 (1977). *See also A Report to the Governor and the State Legislature of Hawaii, Management Audit of the Leasehold to Fee Conversion Program of the Hawaii Housing Authority*, No. 82-4, at 9 (Feb. 1982):

> At the time of the initial enactment of the land reform law, it was recognized that the law raised serious constitutional issues: (1) whether the taking authorized by the law constituted taking for a "public use," and (2) whether that provision of the law making it applicable to leases existing at the time of the enactment of the law constituted an "impairment of the obligation of contracts."

[109] Indeed, our characterization of appellants' argument may be overly generous, since the logical import of HHA's argument is that the Public Use requirement serves no purpose (HHA Br. 30) and offers no protection against condemnation (HHA Br. 34).

B. The Public Use Requirement Forbids the State from Transfering Property from One Private Party to Another for the Exclusive Use and Benefit of the Latter.

The Court of Appeals ruled that the Public Use requirement forbade the state from using its condemnation power simply to transfer fee simple title from one private party to another for the latter's private use and benefit. That ruling correctly expresses the core purpose of the Public Use requirement and should be affirmed. A number of considerations strongly support the judgment below.

1. The Court of Appeals properly began its analysis by referring to the common law origins of the eminent domain power (HHA JS App. A5-A10). History discloses that the preservation of private property was of unquestionable importance to the authors of the Constitution and the Bill of Rights.[110] The idea that the protection of property interests was central to, if not the sole function of, government was expressed in both scholarly literature[111] and on the floor of the Convention of

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[110] B. Schwartz, *A Commentary on the Constitution of the United States: Part II, The Rights of Property* 18-22 (1965), and *Part III, the Rights of the Person* 8 (1968); Special Project, *The Private Use of Public Power: The Private University and the Power of Eminent Domain*, 27 Vand. L. Rev. 681, 682-83 (1974). John Adams expressed the view that "property must be secured or liberty cannot exist" (P. Freund, *The Supreme Court in the United States* 35 (1961)), and James Madison observed that "[g]overnment is instituted no less for protection of the property, than of the persons of individuals." *The Federalist* No. 54 at 370 (J. Cooke ed. 1961).

[111] John Locke, whose writings provided "the accepted theory of government in America when the American doctrine of eminent domain was being hammered out" (Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 586 (1972)), considered protection of property to be a core social value: "For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should have Property * * *." J. Locke, *An Essay Concerning Civil Government*, in J. Locke, *Two Treatises of Government*, 378-80 (P. Laslett ed. 1960); *see also The Federalist* No. 10, at 104-09 (J. Madison) (Hamilton ed. 1968).

1787 [112] as a vital check on the legislature's power to infringe fundamental private property rights.[113] The Founding Fathers, who were well versed in the doctrine of their day,[114] knew that unless some absolute limits were imposed upon the awesome power of majoritarian rule,[115] the basic rights only recently secured would fall prey to the same arbitrary despotism from which the colonists had, at great cost, broken free. In that respect, the Founding Fathers' firm belief that ownership of private property was a special aspect of our recently-won freedom confirms that a taking of private property for private use was never understood to be a legitimate exercise of the sovereign's power. Because the threat to property rights was believed to be particularly real,[116] the

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[112] I M. Farrand, *Records of the Federal Convention of 1787*, at 434, 533-34, 541-42 (1927), and II M. Farrand, *supra*, at 123.

[113] Stoebuck, *supra*, 47 Wash. L. Rev. at 593-595; B. Schwartz, *supra*, *Part II*.

[114] *See* B. Schwartz, *supra*, *Part II*, at 27-29 (1965); Scheiber, "The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts," in 5 *Perspectives in Am. Hist.* 327, 362 (B. Bailyn & D. Flemming eds. 1971).

[115] *See, e.g.*, Letter from James Madison to Thomas Jefferson (Oct. 17, 1778), reprinted in 5 *The Writings of James Madison* at 272: "Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents."

[116] As James Madison informed the Convention, "[i]n future times a great majority of the people will not only be without landed, but any other sort of, property. These [may] * * * combine under the influence of their common situation; in which case the rights of property & the public liberty, [will be endangered] * * *." II M. Farrand, *supra*, 203-204. *See also* Letter from James Madison to Thomas Jefferson (Oct. 14, 1787), reprinted in 5 *The Writings of James Madison* at 29; *The Federalist* No. 10, at 104-109 (J. Madison); *id.* No. 70, at 522 (A. Hamilton).

Public Use limitation was one of the three [117] especially important protections considered by the Convention.[118]

The Framers' concern for the preservation of property rights, coupled with their intent to fashion a government of limited powers, demonstrate that the Public Use restriction was designed to prevent taking property from *A* for the wholly private use of *B*.[119] The impropriety of such private takings was acknowledged in ancient Rome,[120] asserted as dogma by civil and common law philosophers such as Pufendorf,[121] Burlamaqui,[122] de Vat-

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[117] Another, obviously, was the Just Compensation requirement. A third, considered but not adopted, would have apportioned political power as well as the franchise on the basis of wealth or property. *See* I. M. Farrand, *supra*, at 533 (remarks of Gov. Morris of Pennsylvania); *id.* at 541 (remarks of Mr. King of Massachusetts); *id.* at 542 (remarks of Mr. Butler of South Carolina). The Framers apparently did not believe that, at a time when each state permitted only freeholders to vote and hold office, and when Senators were chosen by state legislatures, the omission of this requirement would endanger property rights.

[118] Stoebuck, *supra*, 47 Wash. L. Rev. at 593.

[119] *See, e.g.*, Stoebuck, *supra*, 47 Wash. L. Rev. at 595; B. Schwartz, *supra*, *Part II*, at 18-22, 240-241 (1977); Comment, *Rex Non Protest Peccare??? The Decline and Fall of the Public Use Limitation on Eminent Domain*, 76 Dick L. Rev. 266, 280-281 (1972).

[120] Although practice under Roman law varied, it is clear that expropriation of private property was limited to certain well recognized classes of public works and depended upon the urgency of the public need. Jones, *Expropriation in Roman Law*, 45 Law Q. Rev. 512, 521, 525 (1929). Some evidence suggests that expropriation of private property could not be compelled under Roman law even in the public interest. *Id.* at 521 n.30.

[121] S. Pufendorf, *On the Laws of Nature and Nations* 1070 (Oldfather & Oldfather trans. 1964).

[122] 2 J. Burlamaqui, *The Principles of Natural and Political Law* 45-47 (5th ed. T. Nugent trans. 1807).

tel,[123] Rutherforth [124] and Blackstone,[125] and even found expression in contemporary state constitutions.[126] The explicit constitutional protection given individual property rights by our Founding Fathers in the text of the Public Use requirement, in both its original [127] and final

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[123] E. de Vattel, *The Law of Nations* 19 (C. Fenwick trans. 1916).

[124] T. Rutherforth, *Institutes of Natural Law* 399, 453-54 (2d American ed. 1832).

[125] 1 W. Blackstone, *Commentaries* 139 (T. Cooley ed. 1884). The early jurisprudential writers had considerable prestige and influence among American colonists (Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 Stan. L. Rev. 843, 860 (1978)), and believed that the power of eminent domain should be more restricted than other governmental powers such as the police power. Stoebuck, *supra*, 47 Wash. L. Rev. at 589, 595. While their terminology varied, none envisioned purely private takings as a legitimate exercise of the state's eminent domain power. *Id.*, citing H. Grotius, *De Jure Belli ac Pacis* 385 (F. Kelsey trans. 1925); E. de Vattel, *The Law of Nations* 96 (C. Fenwick trans. 1916); S. Pufendorf, *De Jure Naturae et Gentium* 1285 (C. and W. Oldfather trans. 1934); C. van Bynkershoek, *Quaestionum Juris Publici* 218 (T. Frank trans. 1930). Blackstone—cited by the Founding Fathers as often as any other source (C. Mullett, *Fundamental Law and the American Revolution 1760-1776* 78 (1966); C. Rossiter, *Seedtime of the Republic* 357-58 (1953))—would even later assert that private property could not be taken for public use under *any* circumstances. *Commentaries* 139.

[126] The public use restriction first appeared in several of the state constitutions (*see, e.g.*, Pa. Const., Declaration of Rights, art. VIII (1776), found in 5 F. Thorpe, *Federal and State Constitutions* 3080 (1909); Va. Const., Bill of Rights, Sec. 6 (1776), found in 7 F. Thorpe, *supra*, at 3813), and was variously defined in terms of "necessity" (Vt. Const., Ch. I, Art. II (1786), found in 6 F. Thorpe, *supra*, at 3752) and "public exigencies." 3 F. Thorpe, *supra*, at 1891. It is highly likely that the Framers relied upon this language and the civil law writers in adopting a standard which prohibited wholly private takings. Stoebuck, *supra*, 47 Wash. L. Rev. at 591-592.

[127] Madison's original version provided that "No person shall be * * * obliged to relinquish his property, where it may be necessary for public use, without a just compensation." 1 Annals of Congress 434 (J. Gales ed. 1789). The addition of the term

forms, reflects the principle that private takings of the type at issue here are wholly repugnant to our constitutional system.[128]

2. In light of that historical background, it is scarcely surprising that the Court has acknowledged virtually from its inception that "a law that takes *property* from A. and gives it to B. * * * is against all reason and justice * * * [and such power] cannot be presumed" to have been granted to the government. *Calder V. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J., seriatim opinion) (emphasis in original). In the words of Justice Story for the Court:

> We know of no case, in which a legislative act to transfer property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been consistently resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced * * *. [*Wilkinson* v. *Leland*, 27 U.S. (2 Pet.) 627, 658 (1829).]

The Court applied that principle in *Missouri Pacific R.R. Co.* v. *Nebraska*, 164 U.S. 403, 417 (1896), ruling that "[t]he taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment * * *." This consensus was so firmly established that the Court could unequivocably state in *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U.S. at 251-252:

> There ought not to be any dispute, at this day, in reference to the principle which must control in all cases of the condemnation of private property for public purposes. It is fundamental in American ju-

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"private" and the retention of the "public use" phrase actually strengthened the concept in the original version that takings must, indeed, be for a public use.

[128] *See, e.g.*, Corwin, *The Basic Doctrine of American Constitutional Law*, 22 Mich. L. Rev. 247, 264 (1914); Comment, *supra*, 76 Dick L. Rev. at 280-281.

> risprudence that private property cannot be taken by the Government, National or State, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle, this court has said, grows out of the essential nature of all free governments.

The Court, for most of its history, has consistently reaffirmed the principle once acknowledged for the Court by Justice Brandeis that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Thompson* v. *Consolidated Gas Util. Corp.*, 300 U.S. 55, 80 (1937). *See, e.g., United States* v. *Carmack*, 329 U.S. 230, 239 (1946); *Cincinnati* v. *Vester*, 281 U.S. 439, 447 (1930); *Brown* v. *United States*, 263 U.S. 78, 84 (1923); *Fallbrook Irrigation District* v. *Bradley*, 164 U.S. 112, 159 (1896); *Cole* v. *LaGrange*, 113 U.S. 1, 7 (1885); *Parkersburg* v. *Brown*, 106 U.S. 487, 501 (1883); *Loan Ass'n* v. *Topeka*, 87 U.S. (20 Wall.) 655, 663 (1875); *Olcott* v. *Supervisors*, 83 U.S. (16 Wall.) 678, 689 (1873); *Mills* v. *St. Clair*, 49 U.S. (8 How.) 569 (1850).[129]

This limit on the government's condemnation power reflects the Framers' concern with protecting private property. The Court long ago recognized that "in any

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[129] That principle is also implicit in the Court's inquiries as to whether a particular taking served a legitimate public use. That inquiry would have been unnecessary if any particular category of takings or individual condemnations were inevitably legitimate. In each case, the Court's decision plainly assumes that the simple transfer of property from *A* to *B* is forbidden. *See, e.g., United States ex rel. TVA* v. *Welch*, 327 U.S. 546 (1946); *Old Dominion Land Co.* v. *United States*, 269 U.S. 55 (1925); *Milheim* v. *Moffat Tunnel Improvement District*, 262 U.S. 710 (1923); *Rindge Co.* v. *County of Los Angeles*, 262 U.S. 700 (1923); *Block* v. *Hirsch*, 256 U.S. 135 (1921)); *Sears* v. *City of Akron*, 246 U.S. 242 (1918); *O'Neill* v. *Leamer*, 239 U.S. 244 (1915); *Hairston* v. *Danville & Western Ry. Co.*, 208 U.S. 598 (1908); *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906); *Clark* v. *Nash*, 198 U.S. 361 (1905); *Fallbrook Irrigation District* v. *Bradley*, *supra*; *Shoemaker* v. *United States*, 147 U.S. 282 (1893).

society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government" (*Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 324 (1893)), and are "vital principle[s] of republican institutions." *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. at 235-236. The Court has reiterated that principle on more than one occasion (*see, e.g., Olson* v. *United States*, 292 U.S. 246, 254 (1934)) and, more recently, has rejected the artificial distinction between "personal liberties" and "property rights." *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552 (1972).[130]

The principle also finds expression in the Court's Takings and Just Compensation decisions, which have always presumed that takings can only be for a public use. Hence, regulations that "adjust the benefits and burdens of economic life to promote the common good" (*Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979)), and thereby "secure an average reciprocity of advantage" offsetting the burden suffered by any one person (*Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922)), will not be deemed takings. Similarly, the purpose of the Just Compensation requirement is to redistribute the cost of a taking from an aggrieved party to the public at large (*see, e.g., Webb's Fabulous Pharmacies* v. *Beckwith*, 449 U.S. at 163; *Armstrong* v. *United States*, 364 U.S. at 49), which will necessarily be benefitted in every case

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[130] The Court's statement of that principle in *Lynch* merits reiteration:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. [405 U.S. at 552 (citations omitted).]

from a condemnation done for a public use. Because a taking may only be done for such a use, "any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated" may be excluded from the computation. *Monongahela Navigation Co.* v. *United States*, 148 U.S. at 326. *See also Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 5 (1949).

3. This Court has not stood alone in that regard. Every state, either by express constitutional provision [131] or by judicial interpretation,[132] imposes a public use limitation on the exercise of eminent domain. The Court's conclusion that the state may not employ its eminent domain power simply to transfer private property from *A* to *B*, or for any other wholly private purpose, has also been applied by the state courts in numerous rulings invalidating purely private condemnations from the earliest days of our jurisprudence [133] to more recent

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[131] Ala. Const. art. I, § 23; Alaska Const. art. I, § 18; Ariz. Const. art. II, § 17; Ark. Const. art. II, § 22; Cal. Const. art. I, § 19; Colo. Const. art. II, §§ 14 and 15; Conn. Const. art. I, § 11; Del. Const. art. I, § 8; Fla. Const. art. X, § 6; Ga. Const. art. I, § 3 ¶ 1; Hawaii Const. art. I, § 20; Idaho Const. art. I, § 14; Ill. Const. art. I, § 15; Ind. Const. amend. V; Iowa Const. art. I, § 18; Kans. Const. art. XII, § 4; Ky. Const. § 13; La. Const. art. I, § 4; Me. Const. art. I, § 21; Md. Const. art. III, § 40; Mass. Const. Part 1, art. X; Mich. Const. art. 10, § 2; Minn. Const. art. 1, § 13; Miss. Const. art. 3, § 17; Mo. Const. art. I, § 26; Mont. Const. art. II, § 29; Neb. Const. art. I, § 21; Nev. Const. art. VIII, § 7; N.H. Const. Part 1, art. 12; N.J. Const. art. 1, ¶ 20; N.M. Const. art. II, § 20; N.Y. Const. art. 1, § 7; N.D. Const. art. 1, § 16; Ohio Const. art. 1, § 19; Okla. Const. art. 2, § 23; Or. Const. art. I, § 18; Pa. Const. art. 1, § 10; R.I. Const. art. 1, § 16; S.C. Const. art. I, § 13; S.D. Const. art. VI, § 13; Tenn. Const. art. 1, § 21; Tex. Const. art. 1, § 17; Utah Const. art. I, § 22; Vt. Const. Ch. I, art. 2; Va. Const. art. I, § 11; Wash. Const. art. 1, § 16; W. Va. Const. art. 3, § 9; Wis. Const. art. 11, § 2; Wyo. Const. art. 1, § 32.

[132] *Gray* v. *City of High Point*, 203 N.C. 756, 166 S.E. 911 (1932); *Hines* v. *City of Rocky Mount*, 162 N.C. 409, 78 S.E. 510 (1913).

[133] *See, e.g., Taylor* v. *Porter & Ford*, 4 Hill. 140, 145 (N.Y. 1843) ("[i]f there was not one word of qualification in the whole

times.[134] These decisions, rendered both before and after Justice Douglas' decision in *Berman* v. *Parker*, 348 U.S. 26 (1954),[135] have reaffirmed the Framers' belief that

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instrument, I should feel great difficulty in bringing myself to the conclusion that the clause under consideration had clothed the legislature with despotic power; and such is the extent of their authority if they can take the property of A., either with or without compensation, and give it to B."); *Bloodgood* v. *Mohawk & H.R.R.*, 18 Wend. 9, 54 (N.Y. Ct. Corr. of Err. 1837) (Tracy, J. concurring) ("[i]t has never been allowed to be a rightful attribute of sovereignty in any government professing to be founded about fixed laws, however despotic the form of government might be, to take the property of one individual or subject, and bestow it upon another. The possession and exertion of such a power would be incompatible with the nature and object of all government * * *. [I]t follows necessarily that the rightful exertion of a power by the government of taking arbitrarily from any man what is his own, for the purpose of giving it to another, would subvert the foundation principle upon which the government was organized, and resolve the political community into its original chaotic elements").

[134] *Baycol, Inc.* v. *Downtown Development Authority of Fort Lauderdale*, 315 So.2d 451, 455 (Fla. 1975) ("[w]e have been long committed in a consistent series of cases to the proposition that eminent domain cannot be employed to take private property for predominantly *private* use * * *"); *City of Atlanta* v. *Atlanta Gas Light Co.*, 144 Ga. App. 157, 240 S.E.2d 730, 731 (1977) ("[b]ut the power of eminent domain may never be used to acquire property to be used by private individuals solely for private use and private gain"); *City of Owensboro* v. *McCormick*, 581 S.W.2d 3, 5 (Ky. 1978) ("[n]aked and unconditional governmental power to compel a citizen to surrender his productive and attractive property to another citizen who will use it predominantly for his own private profit just because such alternative private use is thought to be preferable in the subjective notion of governmental authorities is repugnant to our constitutional protections * * *").

[135] For pre-*Berman* cases, *see, e.g.*, *Pittsburgh, W. & K. Railroads Co.* v. *Benwood Iron-Works*, 31 W. Va. 710, 8 S.E. 453 (1888); *Shizas* v. *City of Detroit*, 333 Mich. 4[illegible]52 N.W.2d 589 (1952); *Cozad* v. *Kanawha Hardwood Co.*, 139 N.C. 283, 51 S.E. 932 (1905); *Boyd* v. *Ritter Lumber Co.*, 119 Va. 348, 89 S.E. 273 (1916); *Albright* v. *Sussex County Lake & Park Commission*, 71 N.J.L. 303, 57 A. 398 (1904); *In Re Opinion of the Justices*, 204 Mass. 607, 91 N.E. 405 (1910); *City of Gary* v. *Much*, 94 N.E. 583 (Ind. 1911); *Connecticut College for Women* v. *Calvert*, 87 Conn. 421, 88 A. 633

"[t]he power of eminent domain * * * is not a personal privilege" but "is a special authority impressed with a public character and to be utilized for a public end." *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 280 (1943). Distinguished state jurists [136] and commentators [137] have also agreed that the state may not simply

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(1913); *In Re Split Rock Cable-Road Co.*, 128 N.Y. 408, 416, 28 N.E. 506 (1891); *In Re Niagara Falls & W. Ry. Co.*, 108 N.Y. 375, 15 N.E. 429 (1888); *Threlkeld* v. *Third Judicial District Court*, 36 N.M. 350, 15 P.2d 671 (1932); *Neitzel* v. *Spokane International Ry. Co.*, 65 Wash. 100, 117 P. 864 (1911); *Reed* v. *City of Seattle*, 124 Wash. 185, 213 P. 923 (1923); *Howard Mills Co.* v. *Schwartz Lumber & Coal Co.*, 77 Kans. 599, 95 P. 559 (1908); *Gravelly Ford Canal Co.* v. *Pope & Talbot Land Co.*, 36 Cal. App. 556, 178 P. 150 (1918); *Anderson* v. *Smith-Powers Logging Co.*, 71 Or. 276, 139 P. 736 (1914); *Memphis Freight Co.* v. *Mayor & Alderman of Memphis*, 4 Coldwell 4 (Tenn. 1867); *In Re Deansville Cemetery Ass'n*, 66 N.Y. 569 (1876); *In Re Application of Eureka Basin Warehouse and Mfg. Co.*, 96 N.Y. 42 (1884).

For post-*Berman* cases, *see, e.g.*, *Edens* v. *City of Columbia*, 228 S.C. 563, 91 S.E.2d 280 (1956); *Karesh* v. *City Council of Charleston*, 271 S.C. 339, 247 S.E.2d 342 (1978); *City of Little Rock* v. *Raines*, 241 Ark. 1071, 411 S.W.2d 486 (1967); *Phillips* v. *Foster*, 215 Va. 543, 211 S.E.2d 93 (1975); *Redee Inlet Authority* v. *Bastian*, 206 Va. 906, 147 S.E.2d 131 (1966); *In Re City of Seattle*, 96 Wash.2d 616, 638 P.2d 549 (1981); *Earth Management, Inc.* v. *Heard County*, 248 Ga. 442, 283 S.E.2d 455 (1981); *In Re Opinion of the Justices*, 332 Mass. 769, 126 N.E.2d 795 (1955); *Opinion of the Justices*, 152 Me. 440, 131 A.2d 904 (1957); *City and County of San Francisco* v. *Ross*, 44 Cal.2d 52, 279 P.2d 529 (1955); *State* v. *Bank of California*, 5 Wash. App. 861, 491 P.2d 697 (1971); *Arkansas State Highway Comm'n* v. *Alcott*, 260 Ark. 225, 539 S.W.2d 432 (1976).

[136] *See, e.g.*, Chancellor Kent's opinion in *Gardner* v. *Village of Newburgh*, 2 Johns ch. 162 (N.Y. 1816); 2 T. Cooley, *Constitutional Limitations* 1124-41 (8th ed. 1927).

[137] Whether the test is stated as public-use or public purpose, there is one thing about which American courts have always said they were adamant. *Eminent domain cannot be used to transfer property from one private person to another.* That would violate the most fundamental Lockean principle that governments were instituted to protect every man's

transfer property from *A* to *B* by eminent domain. This consensus both demonstrates that this principle has always been an enduring tenet of takings jurisprudence and refutes any suggestion that application of the principle to this case will irreparably disrupt local land-use planning efforts.

C. Chapter 516 Is an Unprecedented Attempt to Use Eminent Domain for Wholly Private Purposes.

1. The concept of "public use" has, of course, greatly expanded over time. It includes uses benefiting the public as well as by the public,[138] the justifying benefits may take a variety of forms,[139] and the government may implement a public use by using private enterprise so long as the public use is predominant and the private benefit is merely incidental.[140] But none of these expansions remotely covers Chapter 516. What the Hawaii legislature has attempted here is unprecedented. In no previous instance has a condemning authority successfully attempted a taking with the reach and sweep for private use of the one embodied in Chapter 516. Unless the Public Use requirement is to be read out of the Constitution,

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property against his neighbor's depredations. [Stoebuck, *supra*, 47 Wash. L. Rev. at 595 (emphasis added).]

See also Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 Wis. L. Rev. 67 (1931); 1 P. Nichols, *The Law of Eminent Domain* § 250, at 494-496 (2d ed. 1917); C. Randolph, *The Law of Eminent Domain* § 39, at 38 (1894); Rottschaefer, *Handbook of American Constitutional Law* 697-703 (1939); 2A J. Sackman & P. Rohan, *Nichols The Law of Eminent Domain* § 7.1 (rev. 3d ed. 1981 & Supp. 1982); 3 Willoughby, *The Constitutional Law of the United States* § 1224, at 1850-56 (2d ed. 1929); Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U.L. Rev. 409, 412-414 (1983); Comment, *supra*, 76 Dick. L. Rev. at 280-281.

[138] *See, e.g., Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U.S. 30 (1916).

[139] *See, e.g., Rindge Co.* v. *County of Los Angeles*, 262 U.S. at 707.

[140] *See, e.g., Berman, supra* (private parties involved in renovation of slums); *Hairston* v. *Danville & Western Ry. Co., supra* (railroad spurs for commerce).

it has been stretched beyond acceptable limits in this case.

Judge Poole pinpointed the central flaw in Chapter 516 when he noted that "the only variable presented is whether A or B holds title to the land * * *" (HHA JS App. A38). The Act neither provides for, requires, presupposes, nor envisions any change of any sort in the possession of the acquired leaseholds or the use to which they or their environs will be put. The condemnations authorized by the Act, furthermore, may take place only at the behest of the private beneficiaries thereof, who will pay for the condemnations themselves and who may be animated by nothing more than a naked desire to expropriate the lessor's title. The Act imposes no restrictions upon a lessee's right after acquiring the property, in turn, to lease his newly-acquired property, notwithstanding the state's professed interest in eliminating leaseholds on this land.

The instant case is indeed unprecedented. This Court is being asked to sanction a private taking that would have shocked the Founders, who viewed ownership of private property on a par with other fundamental rights, and surrounded by the same protections.[141] *Berman* v. *Parker* is the Court's most recent and most expansive public use decision; yet, as we show below, the facts of that case do not even come close to supporting what appellants seek to make of it here. *Berman* involved important public use factors that are nowhere to be found in this statute. And this case, in turn, involves a number of private-taking factors that are nowhere present in *Berman*. The Court could not simply apply *Berman* to this set of facts, but instead would have to extend the *Berman* holding, and even the *Berman* language, in a manner that finds no support in the case itself.

2. Just how far this case outdistances prior precedent is demonstrated by the following factors, all of which are

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[141] *See generally* B. Siegan, *Economic Liberties and the Constitution* (1980).

present here, the aggregate of which have not been present in other cases, and each of which demonstrates the purely private nature of Chapter 516's takings.

(a) *The takings may only be initiated by the very people who will receive the property.* Chapter 516 leaves the taking decision in the hands of the very parties who will ultimately receive the condemned property, who are left without any standard against which their decisions are to be measured, and who, by definition, are not accountable to Trustees or to the public for their decisions.[142] The checkerboard pattern of condemnations contemplated by Chapter 516 epitomizes the Act's failure to achieve its stated public uses and points up the fact that specific private parties are permitted to acquire the private property of others. Indeed, if there is a public necessity for the takings, why are condemnation decisions left to private parties who may or may not exercise their right and proceed with a taking?

(b) *The takings are paid for by the private recipients of the transfer.* As the Court recognized in *United States* v. *Gettysburg Elec. Ry.*, 160 U.S. 668, 680 (1896), takings by the government for itself must be sharply distinguished from takings by private parties for themselves.[143] Transfers to private parties who themselves finance the takings cost the majority of the public nothing, while each member or group of the majority is given the ever-present opportunity at some future time to benefit from such redistribution. By contrast, where the government, and therefore the public, pays for the taking,

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[142] *Compare, e.g., Berman, supra* (government redevelopment corporation); *Welch, supra* (TVA); *Brown, supra* (government); *Fallbrook, supra* (irrigation district).

HHA's hearing is simply a formality in light of the legislature's statement that *any* condemnation will serve a public use (page 26, *supra*). HHA's scrutiny is limited to ascertaining whether sufficient numbers of lessees have applied to purchase.

[143] *See, e.g., Welch, supra* (government provided compensation); *Old Dominion Land Co.*, 269 U.S. 55 (1925) (same); *Fallbrook, supra* (public bonds).

there is a safeguard against the possibility that one group has simply captured governmental power for its own benefit, since the public is not likely to be willing to confer such benefits on any particular group without a public use that will be served thereby.[144]

(c) *The only property taken consists of the ground lots upon which the new owners already own houses.* It is apparent that the real purpose for this taking is simply to provide the lessees with title to the lots they presently rent. There is no taking of undeveloped land for use in an improved or new fashion, or of worthless property to give it life, or of property of any type to use it in any manner other than for the simple satisfaction of the lessees.[145]

(d) *The takings transfer property from one private party to another.* This factor readily distinguishes this case from those in which the government has taken land for its own use[146] or for use by the public under government auspices.[147] There are sound reasons for placing great weight upon the government-use factor. That is because, even though "[t]he test of the public character of an improvement is the use to which it is to be put, not the person by whom it is to be operated" (*Milheim*, 262 U.S. at 719), "where the land is taken by the government itself, there is not much ground to fear any

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[144] As one contemporary scholar has observed, "* * * one of the reasons the takings clause requires the public to *pay* for what it takes is to help ensure that what is paid for benefits the public, since the public will soon tire of paying for purely private acquisitions that do not benefit the commonwealth." L. Tribe, "Memorandum of Constitutional Law," reprinted in *Copyright Infringements: Hearings on S.1758 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 78, 83 (1981 & 1982) (emphasis in original) (hereafter Tribe in *Senate Hearings*).

[145] *Compare, e.g., Berman, supra* (renovation of slums); *Milheim, supra* (tunnel through mountain); *Clark, supra* (irrigation); *Fallbrook, supra* (same).

[146] *See, e.g., Old Dominion Land Co., supra* (military warehouse); *Gettysburg Elec. Ry. Co., supra* (military cemetery).

[147] *See, e.g., Welch, supra* (public park).

abuse of the [taking] power." *Gettysburg Elec. Ry.*, 160 U.S. at 680. Not only is the government accountable to the people for its actions, but the citizenry has an opportunity to exercise oversight where the government will be the responsible party. Takings by the government for itself or the entire public are far less likely to reflect a simple preference for one party over another and, on their face, do not involve the naked transfer of property from *A* to *B*, the core prohibition of the Public Use requirement. In this case, HHA merely serves as a conduit for the passage of title.

(e) *The takings effect no change in the use or usability of the property or its environs; only title passes.* This factor distinguishes the instant case from the vast majority of the takings previously upheld by the Court.[148] A taking which effects at least some change in the use of the property documents the public need for the transformed use, and negates the risk that the government will simply satisfy the acquisitive desires of some private parties.[149] A condemnation of property to effect an improvement, particularly one that will change the nature

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[148] *See, e.g., Berman, supra* (elimination of slums); *Welch* (development of public park); *Milheim, supra* (construction of a railroad tunnel); *Rindge Co.*, 262 U.S. at 706-707 (construction of a road); *Mt. Vernon, supra* (power plant); *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906) (aerial tramway for mining); *Head* v. *Amoskeag Mfg. Co.*, 113 U.S. 9 (1885) (flooding of land for water power). *See also Puerto Rico* v. *Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946) (conversion of sugar lands into small farms); *Poletown Neighborhood Council* v. *City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981) (*per curiam*) (automobile plant). It is important to note that *Poletown* did *not* involve the federal Constitution; the taking was questioned only under the *state* constitution.

[149] HHA's argument (HHA Br. 33) that the Act will shift land from speculative investment to personal residential use overlooks the lack of any statutory restraint upon *lessees'* speculative investment use of the property and the lack of any requirement that the transferee live on the lot (*see* page 13, *supra*).

of the use of the land, further enhances the likelihood that the taking is for a legitimate public use.[150]

(f) *There is no continuing government oversight, regulation, or control once the transfer to other private parties is completed.* Government oversight of takings to redevelop dilapidated communities[151] or with respect to regulated industries for the performance of their assigned functions[152] is important to assure that genuine public uses are fulfilled. In redevelopment takings, the public use is protected by restrictions imposed by the redevelopment plan. Likewise, where the transfer is to a regulated industry, over which the government, and therefore the public, has direct and immediate control, the populace has the opportunity for continuing oversight. Government oversight or control assures that a public use not only precipitates the taking but also continues to play an important role after the taking is completed. There are no such assurances here.[153]

(g) *There is no obligation on the part of the parties receiving the property to conform to any predetermined plan for its use.* Where there is a legitimate necessity for taking someone's property, the condemning authority

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[150] *See, e.g., Berman, supra* (elimination of a slum); *Clark* v. *Nash, supra* (irrigating otherwise valueless land); *Fallbrook, supra* (same). *See also Eastern Sugar, supra* (overall plan for redevelopment of sugar industry).

[151] *See, e.g., Berman, supra.*

[152] *See, e.g., Mt. Vernon, supra* (hydroelectric power company); *Milheim, supra* (tunnel for railroad, telephone, telegraph, water, power, automobiles, and the like); *O'Neill* v. *Leamer, supra* (railroad spur track); *Hairston* v. *Danville & Western Ry. Co., supra* (same).

[153] Zoning laws are insufficient in this regard. Where there is no change in the use of the land, either contemplated or carried out, the zoning laws do not come into play. Here, the lessees quite obviously do not want to change their use of the land, and would surely oppose any rezoning of their homes for commercial, agricultural, conservation, or any use other than residential.

often requires the recipients to conform to a predetermined plan. That requirement helps to guarantee that the property will, in fact, be put to the public uses contemplated by the condemning authority rather than be diverted, after acquisition, to other uses, public or private. This was one of the reasons given by the Solicitor General, for example, in urging the Court to uphold the takings in *Berman*.[154] But no such requirement exists here. Indeed, the random takings permitted by the Act preclude formulation of any plan.

3. If the taking of Trustees' title could be justified here, in spite of the clear private taking factors evident upon the face of the statute, there simply would be no practical limit upon the exercise of the ultimate sovereign power of eminent domain. The text and operation of the statute constitute the only objective measure of its purpose. As opposed to the reality of the statutory text, the legislative findings here are no more than creative rhetoric. Any public body authorized to exercise the power of eminent domain has available to it a litany of "findings" to justify alleged benefits to the public. Such findings could even be used to support the transfer from the many to the few, from the poor to the well-to-do. A few hypotheticals will make the point.

> —A city council wishes to entice an extremely wealthy financier to move to the city. He is reluctant to come because there is insufficient vacant land to satisfy his desire for a large private estate. The council removes this barrier by condemning an extensive area of the city where poor people live, allowing the financier to force the sale by the families in that area of their houses and land. The

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[154] *See, e.g.*, Brief for Appellees D.C. Redevelop. Land Agency and Nat'l Cap. Planning Comm'n, in *Berman* v. *Parker*, No. 22, O.T. 1953, p. 28: "The lessee or purchaser is not given a free hand to deal with the property as he wishes. Instead, he is expressly required to conform to the redevelopment plan." Likewise in *Eastern Sugar*, *supra*, the condemnation pursued a public plan to revitalize Puerto Rico's sugar and liquor industries.

council supports the condemnation with specific findings to the effect that the financier will pay more taxes than the aggregate of the individual landowners; the financier has a history of philanthropy which can be expected to continue and exceed the combined contributions of the original landowners; the long-term ownership of the land by a single individual will reduce the inflation inherent in frequent sales by many landowners; and the crime rate will decline, since the financier has no prior history of criminal activities, whereas there is a high incidence of crime in the area condemned.

—A Sunbelt state is experiencing a dramatic increase in elderly residents, virtually all of whom depend on fixed income or welfare. These senior citizens rely heavily upon the state's medical and social services resources, although they are unable to pay the full cost for such services. As a result, the state has a negative cash flow. The state legislature passes an eminent domain statute to the effect that any professional with an income of over $100,000 a year may force the sale to him of any retired person's land and home. The key finding supporting the statute is that the continuity and economic stability of the state depends upon increased taxes, lower social service pay-outs, and the existence of a balanced population in terms of age.

—A portion of a single county in the West is populated by successful small farmers, but most of the county's citizens are city dwellers. The county's only private club is a tennis/social club, located on the border between the county's rural and urban areas. The club's members, most of whom are city dwellers, wish to enhance their club by adding a golf course. The county council condemns all of the farms, selling to the club sufficient acreage for the golf course, new clubhouse, locker rooms, pro shop, and parking. So as not to lose the crops which otherwise would have been grown, the council sells the remainder of the farm area to an agri-business combine. The council justifies the condemnation on

grounds of aesthetics, improved public health through the use of sports facilities, encouragement of efficient farming by a single land-use operation, and an assured decrease in crime by virtue of fewer families and young people in the area and the creation of jobs at the club.

Some of the "findings" put forth to support the exercise of eminent domain in these hypotheticals are tenuous at best. Others, however, have at least some basis in fact. For example, a legislature could cite a string of studies to buttress its conclusion that transferring land from poor people to rich people will cut down on the incidence of crime, because many commentators have concluded that "street crime" is substantially higher in areas with low-income families and poor housing.[155] "Findings," in other words, are easily come by and can always be used to justify predetermined conclusions. It is for this reason that due deference to legislative findings should never be converted into an abdication of the proper role of the judiciary in this important area of the law.[156] It should also be noted that all three of the above hypotheticals have more attributes of a public use than Chapter 516, because two contemplate a change in the use of the condemned property, while the other involves a change in occupancy and possession.

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[155] *E.g.*, Glasser, *Economic and Sociocultural Variables Affecting Rate of Youth Unemployment, Delinquency and Crime*, 11 Youth & Society 53 (1979); Jacobs, *Inequality and Economic Crime*, 66 Sociology and Social Research 12 (1981); National Institute of Justice, U.S. Dept. of Justice, *Factors Influencing Crime and Instability in Urban Housing Developments* (1980); Clelland & Carter, *The New Myth of Class and Crime*, 18 Criminology 319 (1980); Rodman, *Poverty and Delinquency: A Theoretical Review* in *Theoretical Perspectives on School Crime* (1978); Skogan, *The Distribution of Big-City Crime: A Multi-City Time-Series Analysis*, 13 Urban Affairs Q. 33 (1977).

[156] It is no answer to these hypotheticals that the electorate will be the ultimate judge of any excesses or misjudgments by their elected representatives. By the time the electorate has a chance to change representatives, land may already have been irrevocably taken from its owners, and a retransfer would raise the same problems.

The appropriate inquiry therefore must be to examine the taking, not simply the state's supporting rationale, because it is the *taking* that the Constitution requires to be for a "public use." The analysis proposed here—one requiring an assessment of a proposed taking in light of the seven objective factors outlined above derived from the Court's prior decisions (pp. 54-58)—will permit the courts to resolve public use issues without succumbing to unblinking acceptance of a legislature's judgment or to subjective second-guessing. That analysis is similar to the one the Court has employed to determine whether a regulation effects a taking. In that regard, the Court has eschewed reliance upon a set formula in favor of engaging in "essentially ad hoc, factual inquiries" (*Penn Central*, 438 U.S. at 124) guided by "judgment" as much as "logic" (*Andrus* v. *Allard*, 444 U.S. at 65) to determine whether the state must compensate an aggrieved party. As applied here, the appropriate inquiry would require a court to gauge the nature of the taking by means of the objective, constitutionally significant factors above noted to determine whether that taking is "for public use." [157]

Application of those factors in this case does not require the Court comprehensively to define the full range of constitutionally significant criteria or to identify the weight to be given each one. Because each of the seven factors would surely be material to any inquiry, and because all of them in the aggregate demonstrate the private nature of the state's taking, the condemnation in this case would be unconstitutional under any reasoned test.[158]

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[157] That suggestion is nothing new. *See Fallbrook*, 164 U.S. at 159-160 ("what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject matter in regard to which the character of the use is questioned").

[158] This inquiry also will not greatly intrude upon the state's legislative authority. To be sure, the Public Use requirement makes some compensated takings forbidden, and to that extent restricts legislative authority. But that limitation has long been presumed by the Court's Takings and Just Compensation doctrines. Hence,

4. (a) Even if the Court were to conclude that reliance upon these factors was insufficient in general or in this case—a result we submit would be unwarranted—that would not end the inquiry. Contrary to appellants' suggestions, the Court is not obliged to act merely as a passive observer of the legislative process by uncritically accepting the state's declarations that these takings will serve a legitimate public use.[159] To the contrary, the Court's decisions have long made clear that the legislature's judgment is subject to judicial re-examination.

As late as 1946, Justice Frankfurter could state that "[t]his Court has never deviated from the view that under the Constitution a claim that a taking is not 'for public use' is open for judicial consideration ultimately by this Court." *United States ex rel. TVA* v. *Welch*, 327 U.S. at 557 (concurring opinion).[160] In so doing, Justice Frankfurter did not identify a novel rule of law.[161] With

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eliminating the companion Public Use requirement would necessarily require the Court to expand the scope of the Takings provision and Just Compensation requirements, since there will be no "average reciprocity of advantage" (*Pennsylvania Coal Co.*, 260 U.S. at 415) or "supposed benefit * * * [to the] public" (*Monongahela Navigation Co.*, 148 U.S. at 326) to offset the coercive effect of the state's action. That result would both increase the number of actions requiring compensation and augment the amount of compensation required, thereby multiplying the total cost to the state in instances in which the state has decided *not* to pay for its actions. Because there is no logical reason to believe that the one is more intrusive than the other, there is no ground for concluding that the approach suggested here will disrupt the legislative process.

[159] Professor Tribe has conceded in a different forum that judicial deference to legislative findings in terms of takings for public use is not complete. Tribe in *Senate Hearings* at 85.

[160] The courts are "not [entitled to] assume that these various statements [by the people or legislature], constitutional and legislative, together with the decisions of the state court[s], are conclusive and binding upon this court upon the question as to * * * what is a public use." *Fallbrook*, 164 U.S. at 159. To the contrary, this is a "questio[n] which * * * arise[s] under the Federal Constitution, and we must decide [it] in accordance with our views of constitutional law." 164 U.S. at 159.

[161] Nor did the majority opinion in *Welch* reject the Court's prior doctrine. To the contrary, the majority stated that " 'the question

the possible exception of Justice Douglas' opinion in *Berman*—which, as appellants interpret it, erroneously equates a taking with simple regulation (pp. 78-82, *infra*)—this Court has repeatedly stated that, while state legislative, administrative, or judicial findings are entitled to respect, it is the prerogative and duty of the courts independently to scrutinize the realities of a proposed condemnation and to invalidate those failing to pass constitutional muster.[162] That principle was specifically applied in *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U.S. at 411-417.[163] *See also Thompson* v. *Consoli-*

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of what is a public use is a judicial one' " (327 U.S. at 552), quoting *Cincinnati* v. *Vester*, 281 U.S. at 446, in which the Court rejected the contention that a legislature could bind the courts by its simple declaration of public use. *See United States* v. *New York*, 160 F.2d 479, 482 (2d Cir.) (L. Hand) (*Welch* "did not change the law by removing from all judicial review the 'public use' for which * * * property may be taken. I find it hard to believe that any such radical step was intended"), *cert. denied*, 331 U.S. 832 (1947).

[162] *See, e.g., Shoemaker* v. *United States*, 147 U.S. at 298; *Fallback Irrigation District* v. *Bradley*, 164 U.S. at 159; *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U.S. at 416-417; *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U.S. at 253-254; *Hairston* v. *Danville & Western Ry. Co.*, 208 U.S. at 606; *Sears* v. *City of Akron*, 246 U.S. at 251; *Block* v. *Hirsch*, 256 U.S. at 154; *Rindge Co.* v. *County of Los Angeles*, 262 U.S. at 705; *Milheim* v. *Moffat Tunnel Improvement District*, 262 U.S. at 717; *Cincinnati* v. *Vester*, 281 U.S. at 447; *United States ex rel. TVA* v. *Welch*, 327 U.S. at 552-554; *id.* at 556-557 (Reed, J., & Stone, C.J., concurring). *See also* 2A J. Sackman & P. Rohan, *Nichols The Law of Eminent Domain* § 7.4 (rev. 3d ed. 1981 & Supp. 1982).

[163] The Nebraska State Board of Transportation ordered the Missouri Pacific Railway Company to permit an association of local farmers to construct a grain elevator at its railroad depot. The Board justified that order by finding that the existing facilities were insufficient to accommodate the grain to be shipped by rail, that the public convenience would be promoted by the construction of another grain elevator upon the site of the depot, and that the railroad had unreasonably and discriminatorily refused to permit the farmers' association to construct an elevator while permitting two other parties to do so. 164 U.S. at 408-410, 411-412. The Nebraska Supreme Court, on the railroad's appeal, upheld the validity of the Board's order, observing that, while "[the Board's]

dated Gas Util. Corp., 300 U.S. at 80. The state courts, before and after *Berman*,[164] have also agreed that the

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power to make such findings and order is denied" (*id.* at 413) (citation omitted), "[t]he correctness of the findings of the board is not seriously questioned * * *." *Id.* This Court reversed, concluding that "the order in question, so far as it required the railroad corporation to surrender a part of its land to the [farmers], for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the [farmers]." *Id.* at 417.

[164] For pre-*Berman* cases, *see, e.g.*, *Pittsburgh, W. & K. Railroad Co.* v. *Benwood Iron-Works*, 31 W.Va. 710, 8 S.E. at 458 ("[t]he right to take, which depends upon whether it is to be taken for public or private use, is a judicial question * * *"); *Boyd* v. *Ritter Lumber Co.*, 119, Va. 348, 89 S.E. at 279 ("[t]he Legislature cannot make a use public by declaring it to be such. The question is whether the declared uses are in law public uses, and that is a question which the Courts must determine"); *Minnesota Canal & Power Co.* v. *Koochiching Co.*, 97 Minn. 429, 107 N.W. 405 (1906); *Healy Lumber Co.* v. *Morris*, 333 Wash. 790, 74 P. 681 (1903); *City of Gary* v. *Much, supra; State ex rel. Ford Motor Co.* v. *District Court*, 133 Minn. 221, 158 N.W. 240 (1916); *Bassett* v. *Swenson*, 51 Idaho 256, 5 P.2d 722 (1931); *Southern Ry. Co.* v. *City of Memphis*, 126 Tenn. 267, 148 S.W. 662 (1912); *Komposh* v. *Powers*, 75 Mont. 493, 244 P. 298 (1926), *aff'd*, 275 U.S. 504 (1927); *Gauley & S.R. Co.* v. *Vencill*, 73 W.Va. 650, 80 S.E. 1103 (1914); *Cloth* v. *Chicago, R.I. & P. Ry. Co.*, 97 Ark. 86, 132 S.W. 1005 (1910); *Ozark Coal Co.* v. *Pennsylvania Anthracite R. Co.*, 97 Ark. 495, 134 S.W. 634 (1911); *Wilmington Parking Authority* v. *Ranken*, 105 A.2d 614 (Del. 1954); *Gohld Realty Co.* v. *City of Hartford*, 141 Conn. 135, 104 A.2d 365 (1954); *Talbot* v. *Hudson*, 16 Gray 417 (Mass. 1860); *Sadler* v. *Langham*, 34 Ala. 311 (1859).

For post-*Berman* cases, *see, e.g.*, *Hogue* v. *Port of Seattle*, 54 Wash. 2d 799, 341 P.2d 171, 181 (1959) ("[t]he legislative declaration that the development and redevelopment of these lands as provided in the Act constitute a public use, is a question to be ultimately decided by this court * * *"); *City of Little Rock* v. *Raines*, 241 Ark. 1071, 411 S.W. 2d at 493 ("[w]hether or not a proposed use for which private property is to be taken, even with legislative sanction, is a public or private use is a judicial question which the owner has a right to have determined by the courts"); *Edens* v. *City of Columbia, supra; Karesh* v. *City Counsel of Charlestown, supra; City of Owensboro* v. *McCormick, supra; Redee Inlet Authority* v. *Bastian, supra; In re City of Seattle, supra; Port*

legislature's judgment that a condemnation serves a legitimate public use does not end the constitutional inquiry.

That principle is the necessary consequence of the rule that the Public Use requirement makes certain condemnations forbidden even where the state is willing to pay for them. The contrary rule would permit the state legislature to repeal the Public Use requirement simply by reciting the proper words. *See Cincinnati* v. *Vester*, 281 U.S. at 447; *cf. Railway Labor Executives Ass'n* v. *Gibbons*, 455 U.S. 457, 473 (1982).[165] But constitutional mandates may not be negated by mere legislative declarations, however artfully and imperatively composed. As the Court recognized in *Cincinnati* v. *Vester, supra*, sustaining the constitutionality of a taking upon "a bare recital * * * would be to treat the constitutional provision as giving such a sweeping authority * * * as to

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Authority of St. Paul v. *Groppoli*, 295 Minn. 1, 202 N.W. 2d 371 (1972); *Fifth Avenue Coach Lines, Inc.* v. *City of New York*, 11 N.Y. 2d 342, 183 N.E. 2d 684 (1962); *North Carolina State Highway Comm'n* v. *Asheville School, Inc.*, 5 N.C. 684, 169 S.E. 2d 193 (1969), *aff'd*, 276 N.C. 556, 173 S.E. 2d 909 (1970); *City of Arlington* v. *Bardin*, 478 S.W. 2d 182 (Tex. 1972); *Falkner* v. *Northern States Power Co.*, 75 Wis. 2d 116, 248 N.W. 2d 885 (1977); *In re Coleman Highlands*, 401 S.W. 2d 385 (Mo. 1966); *State Highway Comm'n* v. *Thornton*, 271 N.C. 227, 156 S.E. 2d 248 (1967); *In re Puget Sound Power & Light Co.*, 28 Wash. App. 615, 625 P.2d 723 (1981); *City of Seattle* v. *Loutsis Inv. Co., Inc.*, 16 Wash. App. 158, 554 P.2d 379 (1976); *State* v. *Bank of California, supra; Cordova* v. *City of Tucson*, 16 Ariz. App. 447, 494 P.2d 52 (1972); *State ex rel. Clothier* v. *Yeaman*, 465 S.W. 2d 632 (Mo. 1971); *Duck River Elec. Membership Corp.* v. *City of Manchester*, 529 S.W. 2d 202 (Tenn. 1975); *Arkansas State Highway Comm'n* v. *Alcott, supra; Miro* v. *Superior Court for County of San Bernardino*, 5 Cal. App. 3d 87, 84 Cal. Rptr. 874 (1970); *Redevelopment Agency of Fresno, Inc.* v. *Herrold*, 86 Cal. App. 3d 1024, 150 Cal. Rptr. 621 (1978).

[165] *See also* J. Ely, *Democracy and Distrust* 125-131 (1980) (recognizing a legislative declaration of purposes as sufficient to sustain the constitutionality of a statute will simply lead the legislature to adopt a boilerplate statement of purposes to satisfy the requirement).

make nugatory the express condition upon which the authority is granted." 281 U.S. at 447. In that respect, judicial review assures that the Public Use requirement is not reduced to lifeless words of advice, to be circumvented or ignored by the legislature under the pressures of majoritarian rule.[166]

(b) Appellants' contention that the Court of Appeals gave insufficient weight to the historical and policy justifications for Chapter 516 [167] confuses the weight to be

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[166] That conclusion is fully consistent with the Court's modern constitutional doctrine regarding every other Bill of Rights guarantee. In no other matter is the legislature's judgment final. *See, e.g., Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978) (First Amendment Freedom of Speech Clause); *Larson* v. *Valente*, 456 U.S. 228 (1982) (First Amendment Free Exercise Clause); *United States* v. *Lee*, 455 U.S. 252 (1982) (First Amendment Establishment Clause); *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973) (Fourth Amendment); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (Fifth Amendment Takings provision); *United States* v. *Sioux Nation*, 448 U.S. 371 (1980) (Fifth Amendment Just Compensation requirement); *Santosky* v. *Kramer*, 455 U.S. 745 (1982) (Fifth Amendment Due Process Clause (procedural matter)); *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (same (substantive matter)); *Washington* v. *Texas*, 388 U.S. 14 (1967) (Sixth Amendment Compulsory Process Clause); *Enmund* v. *Florida*, 458 U.S. 782 (1982) (Eighth Amendment Cruel and Unusual Punishments Clause); *Griswold* v. *Connecticut*, 381 U.S. 479, 495-496 (1965) (Goldberg, J., concurring) (Ninth Amendment); *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) (Tenth Amendment).

[167] Appellants refer to the fact that Hawaii is an island and is some distance from the mainland to buttress their argument that the peculiar conditions prevailing there justify Chapter 516. But the fact that Hawaii is surrounded on all sides by the Pacific Ocean rather than fronted on one side (like Oregon), or rather than being landlocked (like Utah) adds nothing to the fact that Hawaii, like *every* state, has a fixed and finite amount of territory. In fact, other states have far worse population-land use problems than Hawaii. An example is Nevada, where 86.5% of the land is *federally* owned (excluding Indian reservations and other federal trust properties) and therefore not subject to the state's eminent domain power, with

given legitimate state interests with the legitimacy of those interests themselves.[168] Simply transferring property from *A* to *B* is an unconstitutional exercise of eminent domain, even if couched as an effort to increase the vertical or horizontal alienability of land (HHA Br. 16-21). *See* Epstein, *Not Deference, But Doctrine: The Eminent Domain Clause*, 1982 Sup. Ct. Rev. at 365-369.[169] Appellants' attempt to rescue the Act by ascrib-

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much of the remaining land uninhabitable because of water scarcity. *United States* v. *New Mexico*, 438 U.S. 696, 699 n.3 (1978).

In any event, just as there is not one law for Athens and another for Rome, surely there is not one Eminent Domain Clause for the Hawaiian Islands and another for Manhattan Island. A statute simply transferring land from *A* to *B* for *B*'s private use and benefit is as unconstitutional in the one case as in the other.

[168] We question whether HHA may even advance interests such as the need to avoid "consequent disruptions in lawful social behavior" (Haw. Rev. Stat. § 516-83(7)) in support of the Act (HHA Br. 5 n.14). It is beyond question that a party may not be forced to sacrifice his federal constitutional rights simply to keep a mob at bay. HHA's argument—that the state may hand over one person's property to another simply to prevent the latter from taking it by force—would permit the state to justify its takings by enforcing a protection racket. As a unanimous Court held when presented with a similar argument, "[t]he constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. * * * '[I]mportant as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.'" *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958) (citation omitted); *cf. Loretto*, 458 U.S. at 439 n.17 ("a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation").

[169] HHA's claim that the state acted with generations of future landowners in mind is also suspect because the Act transfers property to lessees *now* without imposing any restrictions upon *their* ability to impose restraints on alienation. As recently observed (in reference to proposed bills relating to home ownership of video equipment), "it can hardly be contended that the persons who will be aided by the proposed bills are the public at large. Only relatively well-to-do television owners can now afford Betamax, and the claim that Congress intends to aid all those who will *eventually* own such

ing some other public use to it is built upon an imaginative hypothecation of theoretical benefits totally divorced from the actual text and operation of the Act.[170]

(*i*) The legislative finding that the takings will satisfy lessees' desire to own their leaseholds acknowledges that the statute is simply a mechanism to transfer property from *A* to *B*. That transfer is unconstitutional. The plain text of the Constitution forbids it.[171] No decision of this Court or any other permits such a transfer;[172] to the contrary, this Court and others have re-

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costly equipment is suspect because Congress will be passing the measure when only the wealthier strata of the population possesses these machines * * *." Tribe in *Senate Hearings* 84 (emphasis in original). Similarly, the beneficiaries of Chapter 516 are the residents of Honolulu's upper-income neighborhoods. U.S. Dep't of Commerce, Bureau of the Census, *Census of Population and Housing*, Table P-11, PHC 80-2-183 (1980).

[170] Judge Alarcon properly characterized the legislative "findings" as nothing more than "statutory rationalizations" designed to camouflage the legislature's "naked attempt" to transfer private property for private use (HHA JS App. A21). "[A] court always looks to substance and not to mere forms." *Madisonville Traction Co.*, 196 U.S. at 254. *See Epstein, supra*, 1982 Sup. Ct. Rev. at 365-369. And this Court has concluded that it "need not * * * accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975). *See also Mathews* v. *Lucas*, 427 U.S. 495, 508 n.14 (1976); *Califano* v. *Goldfarb*, 430 U.S. 199, 209 n.8 (1977); *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 727 n.13 (1982); *Aloha Airlines, Inc.* v. *Director of Taxation*, 104 S.Ct. 291, 295 (1983).

[171] "The Constitution nowhere sanctions the use of the legislature's power to take property for merely private purposes. * * * Takings for purely private purposes, it must be stressed, are constitutionally forbidden even where compensation is provided." Tribe in *Senate Hearings* 83, 85.

[172] HHA's reliance (HHA Br. 18-19 nn.52-53) upon *Wilson* v. *Iseminger*, 185 U.S. 55 (1902), and *Stewart* v. *Gorter*, 16 A. 644 (Md. 1889), as support for this argument is misplaced. In neither case did the statute "take" any property. The Pennsylvania statute in *Wilson* decreed that, if no demand for rent had been made for

peatedly rejected this contention. *See, e.g., Thompson* v. *Consolidated Gas Util. Corp.*, 300 U.S. at 80. And the pertinent history demonstrates that eminent domain has never been, and may not be, so used.[173]

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21 years, release of the lessor's reversionary interest was presumed. As this Court, in discussing *Wilson*, recognized two Terms ago in *Texaco, Inc.* v. *Short*, 454 U.S. 516, 527-530 (1982), the transfer of property after the owner has abandoned it does not constitute a "taking" under the Eminent Domain Clause. *See id.* at 530 ("It is the owner's failure to make any use of the property—and not any action of the State—that causes the lapse of the property right; there is no 'taking' that requires compensation"). That rationale also explains this Court's decision in *Hawkins* v. *Barney's Lessee*, 30 U.S. (5 Pet.) 457 (1831). *See* 454 U.S. at 526-530 (discussing *Hawkins*).

Similarly, the Maryland statute in *Stewart* simply provided that where a lessor in *subsequently* executed leases chose to lease the land for more than 15 years, the leases would be subject to a tenant's right to purchase the reversion. The wholly prospective operation of that statute renders *Stewart* materially different from this case. In fact, the Maryland Court of Appeals later ruled that a retroactive change in already-executed leases would be unconstitutional, and limited *Stewart* to prospective leases only. *See Marburg* v. *Mercantile Bldg. Co.*, 154 Md. 438, 140 A. 836, 839 (1928).

[173] Appellants forget that "historical evidence must be weighed as well as cited." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 751-752 n.31 (1982). None of appellants' authorities discussed eminent domain, and these references *undermine* their arguments.

For instance, the Statute of *Quia Emptores* (18 Edw. I, st. I, cc. 1-3) hardly provided relief for tenants. To the contrary, "[i]f Edward's legislation is examined, it will be seen that its general tendency is not to weaken, but to strengthen, the position of feudal lords. * * * *Quia Emptores* * * * was designed * * * to preserve those same rights of wardship, marriage, relief, and escheat. Continued sub-infeudation would probably have introduced such chaos into the system of tenures that these incidents would have eventually been evaded almost universally, but *Quia Emptores* perpetuated them. Edward I certainly did a great deal for the feudal lord." T. Plucknett, *A Concise History of the Common Law* 30-31 (5th ed. 1956) (footnote omitted). Moreover, the New York Court of Appeals ruled in 1853 that *Quia Emptores* had no effect upon the right of large landholders in this country to hold estates originally granted by the British Crown. *People* v. *Van*

HHA's attempt to justify the Act as an effort to eradicate the evil of long-term leasing and to afford the citizens of Hawaii the choice of fee simple lots cannot withstand analysis. The legislature has acknowledged that the vast majority of single-family dwellings are already situated on fee simple lots,[174] and in 1975 it deleted the requirement that HHA find a shortage of fee simple housing as a predicate for condemnation.[175] If any further

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Rensselaer, 9 N.Y. 291 (1853). *See* Sutherland, *The Tenantry on the New York Manors*, 41 Corn. L.Q. 620, 633-634 (1956).

HHA's reliance upon New York's mid-19th century efforts to break up large landed estates is also unavailing. The New York Constitution, adopted in 1787 during the height of the Revolutionary War, "expressly disclaimed any impairment of the effect of grants made before October 19, 1775." Sutherland, *supra*, 41 Corn. L.Q. at 624 (footnote omitted). *See* N.Y. Sess. Laws 1812-1815, ch. 227; N.Y. Sess. Laws 1816, ch. 177. Moreover, even though the New York legislature adopted laws taxing the landowners, limiting the length of leaseholds, and abolishing distress for a tenant's failure to pay his rent (*id.* at 632-633), "the taking of the landlord's interest by eminent domain, and its subsequent sale to the occupant of the land * * * was never attempted on the manors." *Id.* at 631. Indeed, Samuel J. Tilden, chairman of a select legislative committee assigned to study this matter, issued a widely-noted report in which he considered any such proposal to be both "doubtful and dangerous." *Report*, N.Y. State Assembly Doc. No. 156, at 17 (Mar. 28, 1846), *quoted in* Sutherland, *supra*, 41 Corn. L.Q. at 631. In light of the New York Court of Appeals' Public Use decisions in *Taylor* v. *Porter & Ford*, *supra*, *Bloodgood* v. *Mohawk & H.R.R. Co.*, *supra* (*see* note 133, *supra*), and *Van Rensselaer*, *supra*, that appraisal was eminently correct.

The Homestead Acts opened for settlement only *unappropriated public* lands (*see, e.g., Gauthier* v. *Morrison*, 232 U.S. 452, 460 (1914)), and did not entitle one party to acquire another's already-settled property. *See, e.g., Atherton* v. *Fowler*, 96 U.S. 513, 519 (1878).

[174] The legislature found in 1972 that 68.9% of owner-occupied housing was fee simple. 1975 Haw. Sess. Laws, Act 184, § 1(b) (HHA JS App. A144). This numerical superiority of fee over leasehold homes has continued to recent times (*see* note 18, *supra*).

[175] Pp. 12-13, *supra*. Judge Poole astutely noted this contradiction between the actual text of the statute and the legislature's "findings" (HHA JS App. A35).

confirmation be needed that Chapter 516 is not directed at a supposed "evil" of residential leaseholds, it can be found in the fact that the statute does not prohibit long-term residential leasing. The Act places no restriction on the lessee's post-acquisition ability to engage in the same form of long-term leasing the legislature declares to be so harmful,[176] and the state itself, under the Act [177] and other state laws,[178] may likewise engage in leasing for long-term residential use. There is not now, and never has been, any state policy against long-term leasing of residential lands.[179]

(*ii*) The legislature's finding that the transfers of title will combat inflation is baseless.[180] Unless the Hawaii legislature can alter the economics of supply and demand, transferring title cannot curb inflation. The statute will not add a foot of land or a single house to the supply; it will effect a change in ownership of only a restricted number of lots presently occupied; the lessee-acquirers will be free to lease to others at whatever rental they choose or to sell at any price they fix; and the statute's operation does not provide for, is not conditioned upon, and, realistically viewed, cannot result in the transfer of title to a large enough group of lots, either in the aggre-

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[176] Judge Poole also noted the significance of this fact below (HHA JS App. A32-33; *see id.* at A36).

[177] "The authority may lease, rent, or resell, any lot and improvements purchased by it under this part." Haw. Rev. Stat. § 516-35(c).

[178] Leasing of public lands for residential purposes is, for example, specifically authorized by Haw. Rev. Stat. §§ 171-44, 171-45, 171-60, 171-72 and 171-93. Indeed, disposition of public lands is *required to be by lease only* unless otherwise specifically authorized. Haw. Rev. Stat. § 171-32.

[179] HHA's argument that Chapter 516 is designed to bring Hawaii into the twentieth century by eliminating feudal restraints on alienation (HHA Br. 16-19) constitutes, in the face of the reality of the statute's terms, a purely academic theorem.

[180] HHA makes only passing references to this justification (HHA Br. 23).

gate or in any classification, to achieve any supposed anti-inflationary effects.[181]

In fact, the statute is bound to *increase* the inflation of land values and rentals. Transfer of ownership will *relieve* the transferred properties of the anti-inflationary controls and regulations, such as rent control and compulsory 55-year lease extensions at controlled prices, now provided by various other state statutes.[182] After acquisi-

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[181] The Act permits lots to be condemned in a random, checkerboard fashion because HHA can pursue only those condemnations which lessees themselves initiate if and when individual lessees desire and can furnish the funds (*see* pp. 12-13, *supra*). It is entirely possible that, as lessees become aware that condemnation proceedings require them to pay fair market value, only a few fee simple titles in a development tract of a thousand leaseholds may be taken. The lessee may at any time decide not to purchase if he suspects that the condemnation award would be greater than he wishes or can afford to pay.

[182] Comprehensive statutory regulation of the conduct of residential lessors under long-term leases include the following provisions of the Hawaii Revised Statutes:

(1) Irrespective of lease provisions to the contrary, rent cannot be renegotiated more frequently than every 15 years (§ 519-2(a)(1));

(2) Upon renegotiation, lessors are strictly limited by statutory formula as to the rent which may be charged (§ 519-2(a)(2));

(3) If the lessor and lessees disagree as to amount of renegotiated rental, the HHA invokes mandatory arbitration to resolve any disputes (§ 519-2(b));

(4) Lessees are guaranteed the right to extend the lease to a new term of 55 years at a formula-controlled fixed rental (§§ 516-65 and -66);

(5) Lessees are guaranteed the right to free assignment of lease, without lessor's consent (§ 516-63);

(6) Lessors are forced to purchase lessees' on-site improvements, if lessees decide not to remove them at termination of their leases, or must extend the lease term for at least 30 years (§ 516-70);

(7) Lessees are guaranteed the right to cure any lease default (§ 516-64); and

(8) Lessors are prohibited from discriminating in leasing on basis of race, religion, sex, ancestry, or physical handicap (§ 516-62).

tion, lessees may sell or lease the land at whatever price and or time they choose.

(*iii*) Appellants also contend that the Act can be supported as an effort to diminish the "concentration" of land ownership. To the extent that appellants seek to justify these takings as an effort to break up a "monopoly" or "oligopoly," it is telling that the Act itself contains no finding that a land "monopoly" or "oligopoly" exists in Hawaii. That omission, in light of the legislature's efforts to buttress the Act's constitutionality, surely proves that the legislature did not premise Chapter 516 upon any such finding.[183]

The statute is not, in any event, aimed at eliminating any supposed concentration of land ownership. It applies to *all* landowners who lease residential lots. On the one hand, it applies to owners of tracts as small as five acres,[184] but, on the other hand, it does not affect owners of vast tracts who have not chosen to lease lots for residential use. Rather than attack concentration of ownership, Chapter 516 simply operates to divest of title those landowners, large or small, whose lessees desire and can afford to buy the fee simple interest.[185]

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[183] The omission was not an accidental oversight. A legislative committee had recommended this very purpose for the Act in *1967* (*see* Conf. Comm. Rep. No. 19 on S.B. No. 1128 (Act 307), 1967 Hawaii Senate Journal 799), but the legislature did not adopt this rationale then, nor has it done so in the 17 years since. The only "finding" concerning the economic power of large landowners is a passing reference to oligopoly in an entirely different statute, Haw. Rev. Stat. Chapter *519*, a rent control law (HHA JS App. A149). It is therefore plain that the legislature knew how to make such a finding when it wished to do so. Chapter 516 contains no such finding.

[184] Under the statute, the lessees may petition HHA to condemn all or a portion of a "development tract" (Haw. Rev. Stat. § 516-22), defined as "a single contiguous area of real property not less than five acres in size." Haw. Rev. Stat. § 516-1(2).

[185] Appellants argue (HHA Br. 22; Portlock Br. 6-8) that Chapter 516 can be justified as a "divestiture" measure, relying upon *Exxon Corp.* v. *Maryland*, 437 U.S. 117 (1978). Their con-

(*iv*) Chapter 516, likewise, has nothing to do with goals such as furthering home ownership or ameliorating the lot of senior citizens.[186] The statute cannot increase the supply of housing or control its cost; it neither creates new houses nor imposes price controls. Landowners are already providing housing; no one contends otherwise.[187] The problem lies in the shortage of presently-available lands for *new* housing, which is in large measure traceable to the state's deliberate policy of curtailing urban and residential expansion and of preserving large acreages for agricultural and conservation purposes.[188] Indeed, Trustees and other owners of substantial amounts of land

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tention is unfounded. First, as we have shown (*see* page 73 and note 183, *supra*), the statute is not an anti-monopoly or anti-oligopoly act. Second, the legislature could not constitutionally declare the existence of a monopoly by statutory fiat. *See McFarland* v. *American Sugar Refining Co.*, 241 U.S. 79, 86-87 (1916). Finally, the Maryland statute at issue merely barred a specific business practice; the operation of retail gasoline stations by petroleum producers or refiners. The affected owners had several years to choose either to discontinue operation or to dispose of the stations by private sale. And, unlike the present case, no property was taken.

[186] *E.g.*, Haw. Rev. Stat. § 516-83(a)(6), (7), and (11).

[187] As Judge Poole noted below, "the large landowners have made residential homesites available, albeit through the traditional leasehold arrangements" (HHA JS App. A36). With land areas limited, the demand for single-family detached dwellings is not easy to satisfy—a problem not unique to urban Hawaii. Condominium residences exist in surplus numbers, however, and of course are entirely unaffected by the statute. (*see id.* at A38 and n.9).

[188] State policy for many years has been to limit population growth, to preserve agricultural and conservation lands, and to prohibit "urban sprawl." *See, e.g.*, State of Hawaii, *General Plan* 36 (1961); General Plan Revision Program, Department of Planning and Economic Development, *State of Hawaii Growth Policies Plan: 1974-1978*, at 63 (1974); and *Report of the Temporary State Commission on Population Stabilization* 1-3 (1972). HHA's reference to the state's purchase of land in Waiahole-Waikane (HHA Br. 5 n.14) is entirely out of context. Chapter 516 did not apply to those lands. The state acquired the land to retain the existing agricultural use and to prevent development of residential lots. This incident proves Trustees' point, not appellants'.

in Hawaii, including land in or near urban centers, are prohibited from making additional land available by state zoning restrictions [189] and enormous amounts of land, including land in or near urban centers, are owned by the state and reserved for non-residential uses.[190]

For the same reasons, Chapter 516 will not assist the elderly. Chapter 516 will not produce one new house and will not reduce the cost of living for any senior citizen.[191] The beneficiaries of Chapter 516 are not the elderly or infirm, but the residents of Honolulu's upper-income neighborhoods who desire to acquire Trustees' fee title for their own private use and who have the economic means to do so.

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[189] Hawaii has a state-wide zoning system under which all lands are classified for urban, rural, agricultural, or conservation uses. Local governments may not override this system. Haw. Rev. Stat. Chapter 205. Under it, 86% of Trustees' land on Oahu, and almost 97% statewide, is zoned for non-urban, non-residential uses. For the state as a whole, the State Land Use Commission has zoned over 96% of all land for non-residential uses. *State of Hawaii Data Book* table 154, at 178 (1982).

[190] The state owns 34.5% of all land. *State of Hawaii Data Book* table 155, at 179 (1982). Some of these holdings could be made available to satisfy the purported shortage of fee simple lots; yet, despite specific constitutional (Haw. Const. Art. XI, § 10) and legislative (Haw. Rev. Stat. §§ 171-13, 171-45, 171-60, 171-70 through 171-84, and Haw. Rev. Stat. Chapter 206) authority to use public lands for residential purposes, the state has generally chosen not to do so. The state is also expressly authorized to use existing public lands, or to acquire public lands in exchange for private lands, to convert leaseholds to fee simple ownership (Haw. Rev. Stat. §§ 171-50.1 and 171-50.2) but has never done so. The state's cry of land shortage in the face of its own vast holdings starkly emphasizes that a shortage of fee simple land in Hawaii is not what Chapter 516 is about.

[191] Existing regulatory measures already control renegotiated lease rents. Haw. Rev. Stat. § 519-2. Chapter 516 has no provision restricting lease rents; nor can it be maintained that by permitting condemnation of fee title, the act will rescue the elderly from the burdens of paying lease rent, for senior citizens who cannot presently afford to pay rent would in no event be able to pay the much larger cost of purchasing fee title.

D. The Question of Whether Chapter 516 Serves a Public Use Cannot Be Answered Simply by Asking Whether the Act Is a Valid Police Power Regulation.

Appellants insist that the Public Use requirement is satisfied if the subject matter of the condemnation is within the state's police power, and that the condemnations authorized by Chapter 516 must therefore be upheld if they can rationally be said to further any conceivably legitimate state interest. That contention is flawed in several respects.

1. To support that interpretation, appellants rely primarily upon Justice Douglas' opinion in *Berman*. But "the language of an opinion is not always to be parsed as though we were dealing with the language of a statute." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979). We submit that *Berman* should not be construed that broadly. Justice Douglas' opinion must be read in the context of the now-classic redevelopment condemnation—in which private gain is only incidental to the overall public use of revitalizing a decaying community[192]—rather than in terms of the very different and heretofore unknown use of the taking power at issue here—under which private gain is the admitted consequence of the Act's adoption.[193]

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[192] "The controlling motive for the condemnation is to clear from the area in question the moral and physical blight which slums and congestion have created, and this dominant aspect of the case establishes the public use. * * * It is not the object of the statute merely to permit the transfer of property from one individual to another. The sale and leasing of the land to private interests is incidental to the accomplishment of the primary purpose." J. Sackman, *Public Use—Updated*, in *Proceedings of the Institute on Planning, Zoning, and Eminent Domain*, 203, 214-215 (1983).

[193] The dramatic difference between *Berman* and this case is pointed up by a single sentence in the Solicitor General's brief in that case:

> The primary basis of appellants' attack upon the Act is the fact that *after the land in the area is acquired and cleared*, and appropriate portions *set aside for public facilities*, the remainder will, *if feasible*, be leased or sold to private individuals or

In that respect, Justice Douglas' sweeping declaration of the broad power of the legislature to determine whether the taking served the public welfare is not inconsistent with our submission. Justice Douglas did not state, and could not have intended to imply, that the Public Use requirement was an unwanted child among the Bill of Rights guarantees.[194] While appellants point to *dicta* in *Berman* as supporting their position, the facts of that case actually demonstrate the extraordinary difference between what the Court was ruling upon there and what appellants would have the Court rule here. In *Berman* (a) an identified tract of known size and location was taken, (b) *all* of the property was commercial property, (c) the taking was pursuant to a comprehensive, cohesive

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corporations *for redevelopment according to the plan.* [Brief for Appellee D.C. Redevelop. Land Agency and Nat'l Cap. Planning Comm'n, p. 25 in No. 22, O.T. 1953, *Berman* v. *Parker* (emphasis added).]

Here, the land is not acquired and cleared by the government, portions are not set aside for public facilities, there is no question but that the property will be sold to private individuals, no redevelopment will take place, and there is no post-acquisition plan to which the purchaser must conform.

Moreover, in his brief to the Court, the Solicitor General in *Berman* repeatedly emphasized that what was involved there was the elimination and prevention of slums (pp. 2, 10, 11, 12, 13, 18, 19, 21, 24, 28, 32, 34, 35, 36, 37, 38, 41, 42, 43, 44); slum or slum-breeding conditions (pp. 10, 11, 19, 24, 28, 30, 38, 45, 46); slum problems (p. 2); slum prevention (pp. 37, 43); slum clearance (p. 42); substandard housing and dwellings (pp. 2, 3, 4, 10, 19, 21, 24-25, 32, 41, 42, 56); substandard conditions (pp. 42-43); blight (pp. 3, 5, 35, 37); blighted areas, territories or neighborhoods (pp. 3, 4, 5, 10, 19, 20, 21, 24, 32, 37, 44, 56, 57); blighting factors (p. 5); housing blight (p. 38); urban blight (p. 36); urban decay (p. 37); unsafe and unsanitary housing conditions (p. 20); deteriorated areas and neighborhoods (p. 36); dilapidated and unsanitary structures (p. 38); and alleys used for human habitation (p. 3).

[194] Justice Douglas observed that legislative power is "[s]ubject to specific constitutional limitations" (348 U.S. at 32)—of which the Public Use requirement is one—and prefaced his discussion of the reasonableness of the taking in that case by acknowledging that "the object [of the condemnation must be] within the authority of Congress" (*id.* at 33); *see also id.* at 35-36.

public plan, (d) the purpose of the taking was to redevelop a large area in order to eliminate and prevent them and substandard housing conditions, (e) the property was actually taken by the government and then resold or leased, (f) the reselling or leasing was subject to carefully drawn conditions designed to accomplish the purposes of the anti-slum Act, and (g) substantial amounts of land were taken for public agencies for use as utilities, schools, recreational facilities, and the like. *None* of these factors is present in this case.

But if Justice Douglas' opinion in *Berman* did interpret the Public Use requirement to require nothing more from the courts than a nod in the direction of the legislature's statutory findings and declaration of public use, as appellants contend, then we submit that the Court ought to re-examine and limit his broad dicta for the following reasons.

2. (a) Appellants' argument entirely ignores the material differences between the state's taking power and its police power. There is no Public Use limitation on the state's regulatory authority. Hence, the redistribution of property through regulation need not satisfy the Public Use (or Just Compensation) requirement, simply because regulation falling short of a taking is not affected by the Eminent Domain Clause at all.[195]

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[195] The question of whether a taking is a legitimate exercise of the state's police power is simply the beginning of the inquiry. In every case "the government's chosen means must rationally further some legitimate state purpose" (*Moore* v. *City of East Cleveland*, 431 U.S. at 498 n.6 (plurality opinion of Powell, J)), and police power regulations failing that test will be struck down as being unconstitutionally arbitrary or capricious. *See id.* at 513-521 (Stevens, J., concurring in the judgment); *Nectow* v. *City of Cambridge*, 277 U.S. 183, 188 (1928); *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395 (1926). *See also San Diego Gas & Elec. Co.* v. *City of San Diego*, 450 U.S. 621, 633-634 (1981) (Rehnquist, J., concurring but expressing "agree[ment] with much of what is said in the dissenting opinion of Justice Brennan" on the merits); *id.* at 656 (separate opinion of Brennan, J., joined by Stewart, Marshall, & Powell, JJ., dissenting from the majority's refusal to consider the merits). Hence, even if Chapter 516 were

(b) Moreover, appellants cannot so cavalierly expunge the Public Use requirement from the Constitution. The Court has recently made clear that affirmative constitutional limitations upon legislative power may not be so evaded. In *Railway Labor Executives' Ass'n* v. *Gibbons*, *supra*, the Court ruled that the constitutionality of selective Congressional bankruptcy laws must be measured against the Bankruptcy Clause, rather than the Commerce Clause, because the former contains a uniformity limitation absent from the latter. 455 U.S. at 468. Aware that "[u]nlike the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States" (*id.*), the Court accepted as indisputable the conclusion that "if we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws." *Id.* at 468-469. Appellants' argument suffers from the same flaw the Court recognized in *Gibbons*.

The Court has also consistently refused to permit police power justifications such as the protection of state residents' health or safety to immunize state economic measures from scrutiny under the Commerce Clause, which *lacks* a specific limitation on state legislative power, unlike the Public Use requirement.[196] For ex-

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a legitimate exercise of the state's police power—a proposition we dispute (pp. 82-83, *infra*)—that would at best be a necessary but, by itself, insufficient prerequisite for constitutionality. *Cf. San Diego Gas & Elec.*, 450 U.S. at 656 (separate opinion of Brennan, J.). These condemnations must still satisfy the Public Use requirement.

[196] "In terms, the [Commerce] Clause is a grant of authority to Congress, not an explicit limitation on the power of the States. In a long line of cases stretching back to the early days of the Republic, however, this Court has recognized that the Commerce Clause contains an implied limitation on the power of the States to interfere with or impose burdens upon interstate commerce." *Western & Southern Life Ins. Co.* v. *California State Board of Equalization*, 451 U.S. 648, 652 (1981).

ample, highway safety measures are among those "the Court has been most reluctant to invalidate" (*Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429, 443 (1978)), and are entitled to both a "strong presumption of validity" (*Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959)) and freedom from federal court "second-guess[ing] [of the] legislative judgment about their importance" so long as their "safety justifications are not illusory * * *." *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) (plurality opinion) (citation omitted). Nonetheless, the Court has made clear that "the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack," because the law "may further the purpose so marginally, and interfere with commerce so substantially * * *," as to be constitutionally infirm. *Id.* at 670.[197]

(c) Appellants' argument is also inconsistent with settled Takings and Just Compensation doctrine. The Court's decisions have recognized that both provisions restrict the state's condemnation power in ways distinct from the general due process limits. Accordingly, the Court has ruled that the inquiry in each case is not confined to the question of whether a particular action is a valid exercise of the state's police power.[198]

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[197] State economic measures that either directly regulate interstate commerce (*see, e.g., Edgar* v. *Mite Corp.*, 457 U.S. 624, 641-643 (1982)) or simply favor domestic interests (*see, e.g., Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978)) are virtually per se invalid, even where the regulation is designed to protect a resource "essential for human survival," like water. *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 952 (1982).

[198] Writing for this Court long ago, Justice Holmes acknowledged that a state's police power was necessarily broad (*Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. at 413), but he nonetheless distinguished between regulation and condemnation. He ruled that where "regulation goes too far it will be recognized as a taking" (*id.* at 415), even where, as the dissent argued, that regulation is "imposed to protect the public health, safety, or morals from dangers threatened." *Id.* at 417 (Brandeis, J., dissenting). The Court has often reiterated that proposition since *Mahon* (*see, e.g., Pruneyard*

In each instance the Court has ruled that the legislature's judgment does not end the constitutional inquiry. Whether the question is, "has a taking occurred" or "has just compensation been paid," this Court's decisions have consistently emphasized that the purpose for which the Eminent Domain Clause was adopted—to "ba[r] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong* v. *United States*, 364 U.S. at 49)—forecloses any argument that a legislature's judgment can be wholly unfettered, even where the legislature has declared that its actions will

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Shopping Center v. *Robins*, 447 U.S. 74, 83 (1980)), and has also recently applied the doctrine in three different contexts, ruling in each case that an otherwise valid exercise of the state's police power was nonetheless subject to the requirements of the Eminent Domain Clause. *See United States* v. *Security Indus. Bank*, 459 U.S. 70 (1982) (Eminent Domain Clause limits Congress' authority under Bankruptcy Clause); *Loretto*, 458 U.S. at 425 (Eminent Domain Clause limits state's police power); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 172-173 (1979) (Eminent Domain Clause limits Congress' authority under the Commerce and Admirality Clauses). Hence, just as "a State, by *ipse dixit*, may not transform private property into public property without compensation, even for [a] limited duration * * *" (*Webb's Fabulous Pharmacies*, 449 U.S. at 164), so too a state may not escape the effect of the Takings provision simply by labeling its actions as an exercise of its police power.

Likewise, a legislative declaration that a certain amount or formula of compensation is "just" does not end the constitutional inquiry. This Court has long recognized that "[i]t does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation." *Monongahela Navigation Co.* v. *United States*, 148 U.S. at 327. Because "the determination of the measure of just compensation for a taking of private property 'is a judicial and not a legislative question'" (*Sioux Nations*, 448 U.S. at 417 n.30 (citation omitted)), "no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard." *United States* v. *New River Collieries Co.*, 262 U.S. 341, 344 (1923). *See also United States* v. *564.54 Acres of Land*, 441 U.S. 506 (1979).

advance the public welfare. Because the legislature's judgments reflect, at best, only the majority's will—which the Eminent Domain Clause has as its purpose to limit—the Clause cannot be given effect if the legislature's judgments are self-sustaining. Given that purpose and the lack of a textual, structural, or historical reason for treating Public Use questions differently, it is plain that the state's declaration that the public welfare will be advanced by its actions, while necessary to withstand constitutional challenge as being arbitrary or capricious, is not by itself sufficient to satisfy the Public Use requirement.[199]

III. CHAPTER 516 VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. Chapter 516 Authorizes the Condemnation of Trustees' Property for the Purely Private Gain of the Lessees.

Our submission in Point II confirms that Chapter 516 does not rationally implement a legitimate public policy, and therefore violates due process. *Moore*, 431 U.S. at

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[199] Payment of "full" compensation (HHA Br. 15) cannot pardon a private taking. The Just Compensation and Public Use requirements are complementary provisions, not alternative ones. The Public Use requirement was designed to assure the citizenry that the property in which they have invested not merely their monies but also all those "subjective needs and attitudes" that make up what each person can call his own (*Kimball Laundry Co.* v. *United States*, 338 U.S. at 5)—attributes that no amount of money can ever replace—will not be forever expropriated unless the government can establish a public use justification for doing so. Moreover, purely private takings leave an aggrieved party *undercompensated* because there is no "benefit that the owner may receive in common with all from the public uses to which his private property is appropriated" which offset the destroyed "personal element" suffered by the condemnee. *Monongahela Navigation Co.*, 148 U.S. at 326. Hence, purely private transfers of property will *not* be fully compensated. *See* Tribe in *Senate Hearings* at 85. HHA's argument, which ascribes no purpose whatever to the Public Use requirement (HHA Br. 34), thus seriously misreads the constitutional text.

514, 520-521 (Stevens, J., concurring); *Nectow*, 277 U.S. at 188-189. The Act's provisions have no rational connection with any of its proclaimed goals of curbing inflation, eliminating a concentration of land ownership, and providing fee simple residential houselots (pp. 70-75). The legislative "findings" are only self-serving rhetoric adopted to obscure the statute's purely private object—to benefit a narrow class of lessees at the expense of a political minority of lessors—a goal which "cannot constitute a *legitimate* governmental interest." *United States Dep't of Agriculture* v. *Moreno*, 413 U.S. 528, 534 (1973) (emphasis in original); *see Zobel* v. *Williams*, 457 U.S. 55, 62-64, 65 (1982). And even assuming that the legislature had a legitimate public end in mind, the method employed by Chapter 516 "has so speculative and attenuated a connection to [these ends]" as to represent no more than "the exercise of a strained imagination." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 442 (1982) (Blackmun, J., concurring).

B. Chapter 516 Impermissibly Delegates State Eminent Domain Authority to Financially-Self-Interested Private Parties.

Compounding the *substantive* failings of Chapter 516 are two *procedural* infirmities which present independent reasons for upholding the Court of Appeals' judgment. On the one hand, due process forbids the state from delegating absolute, standardless authority over the right to invoke its eminent domain power to private parties, who are neither legally nor politically accountable to those over whom they may exercise authority or to the public for the criteria that guide their decisions. *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928); *Eubank* v. *City of Richmond*, 226 U.S. 137 (1912). *See also City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668, 677-678 & n.12 (1976). And, on the other hand, due process also forbids the state from vesting decisionmaking authority over a person's property in the hands of parties who have a direct, personal, and substantial pecuniary interest in the

outcome of their judgments. *Connally* v. *Georgia*, 429 U.S. 245 (1977) (*per curiam*); *Gibson* v. *Berryhill*, 411 U.S. at 578-579; *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *Tumey* v. *Ohio*, 273 U.S. 510 (1927).[200]

As the Court of Appeals recognized,[201] although the lessors' current use is manifestly entitled to due process protection,[202] the power delegated to private lessees by the Act, blessed as a proper public use in every instance,[203] entitles them to expropriate a lessor's fee simple title. And the lessees obviously have a direct, personal, substantial, and pecuniary interest in the outcome of the condemna-

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[200] Together, these decisions protect a person against the arbitrary deprivation of his property by assuring that the decisionmaking process is neither so unrestrained as to permit virtually any reason, including "so arbitrary a thing as taste" (*Eubank*, 226 U.S. at 144), to be dispositive, nor so directly and inevitably channelled towards one intrinsically-unfair result (*Tumey*) as to render the decisionmaking process simply a hollow formality.

[201] HHA JS App. A32 ("[u]nder [Section 516-22], the Hawaii Housing Authority may elect to condemn only those lots which lessees have applied to purchase" (Poole, J.)); *see id.* at A2.

That HHA holds a hearing *after* the lessees' application does not detract from this conclusion. *Ward* clearly rejected the proposition that provision for an appeal from the judgment of an initial biased decisionmaker can rehabilitate the due process infirmities inherent in the initial decision. 409 U.S. at 61-62. Moreover, since the state legislature has declared that *any* and *all* takings will serve a public purpose (page 26, *supra*), the follow-up hearing is simply a formality, as the evidence introduced below demonstrates (JA 162-165).

[202] The lessors' right, as a legitimate incident of ownership, to rent their property rather than sell it is unquestionably entitled to constitutional protection. *See Roberge*, 278 U.S. at 121 ("[t]he right of the trustee to devote its land to any legitimate use is properly within the protection of the Constitution"). Even under Chapter 516, the lessors' current, entirely-lawful possession and use are left undisturbed until a lessee, for any reason, applies for the right personally to use the state's eminent domain authority to obtain title.

[203] Haw. Rev. Stat. §§ 516-83(a)(10) & (12); page 26, *supra*. That compensation is awarded for such takings cannot rehabilitate the due process violation. *See* Nos. 83-141 & 83-283 Motions to Affirm 26-27 n.70.

tion proceedings notwithstanding their payment of compensation for Trustees' property.[204] Because the takings authorized by Chapter 516 can only be initiated by the unlawfully-delegated actions of financially-self-interested private parties, *Eubank* and *Tumey* require that any condemnation so initiated be set aside.

IV. CHAPTER 516 VIOLATES THE CONTRACT CLAUSE OF THE CONSTITUTION.

Retrospective application of Chapter 516 severely impairs the obligations of pre-existing lease contracts in violation of the Contract Clause.[205] The Contract Clause is an especially vital constitutional limit upon state impairment of antecedent contractual obligations if, as appellants contend, eminent domain is simply a *means* to an end.[206] In that respect, this question cannot be resolved simply by characterizing the state's action as a "taking," rather than an "impairment," of a contract. If *Berman* has so modified the Public Use requirement as to make the state's eminent domain power the equal of its police power, then *Berman* has also eliminated the dis-

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[204] This is necessarily so for at least two reasons. First, if the rents lessees are currently paying and will continue to pay are as exorbitant as appellants claim, lessees will surely pay less in compensation for the ground land than they will pay in rent. And second, if the purchase price of ground land has become artificially high, as appellants also contend, then lessees will surely be able to take advantage of that price by selling both the ground land and the houses situate thereon. Hence, lessees plainly will receive a substantial pecuniary benefit from their condemnation of Trustees' property despite their payment of a compensation award. In fact, their efforts to acquire Trustees' land itself demonstrates that they certainly perceive the benefits of doing so.

[205] Prior to the date on which Chapter 516 became law, approximately 7,500 of Trustees' leases were in effect. Although the Act became law on June 24, 1967 (1967 Haw. Sess. Laws, Act 307, § 46), the effective date of the condemnation provisions, contained in Part II of the Act, here in issue, was postponed until July 1, 1969. *Id.*

[206] Trustees do not contend that leases executed after the enactment of Chapter 516 have been unconstitutionally impaired. *See Texaco, Inc.* v. *Short*, 454 U.S. at 531.

tinction between a taking and an impairment of vested contract rights, which had been premised on the special nature of eminent domain (*see* note 207, *infra*). In that event, the takings here must be treated in the same manner as a statute which both *adds* a purchase option to an outstanding lease and *subtracts* the lessor's reversionary interest and his damage remedy for the lessee's breach, a remedy otherwise retained by every contracting party in the state except those, like Trustees, who happen to be subject to the Act.

1. The threshold inquiry, whether Chapter 516 has substantially impaired Trustees' leases (*Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 244 (1978)), has, as noted above, definitely been met.[207] The effect of the statute was immediate, permanent, and unavoidable; no grace period or other relief was accorded the lessor.[208] Nor had the field been previously subject to regulation; Chapter 516 chartered new and unexplored territory.[209]

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[207] The benefit given to the lessee eliminated the lessor's right to regain the premises at the end of the term. The value of the lessor's interest was also immediately affected. This detrimental reordering, *in advance of condemnation*, of vested rights and obligations under pre-existing lease contracts, transgresses the limits of the Contract Clause, whether or not the lease contract is ever in fact condemned. This consideration distinguishes the instant case from cases such as *Contributors to Pennsylvania Hospital* v. *Philadelphia*, 245 U.S. 20, 23-24 (1917), *Cincinnati* v. *Louisville & Nashville Railroad Co.*, 223 U.S. 390, 400 (1912), and *Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. 685, 691 (1897). In these cases, the contract was taken merely as an incident to condemnation of other tangible property, and no statute had impaired the contract prior to the actual condemnation itself. Nor is *Hays* v. *Port of Seattle*, 251 U.S. 233, 237-38 (1920), apposite, since the state was subject to suit for its breach of an existing contract. Here, the state has not afforded lessors a damages remedy.

[208] The statute applied to all leases "existing and in force on June 24, 1967" and retroactively abrogated all inconsistent provisions in these leases. Haw. Rev. Stat. § 516-61.

[209] Lack of a prior regulation bears upon the reasonable expectations of the aggrieved party. *Allied Structural Steel Co.*, 438 U.S. at 242 n.13, 249-250; *cf. Energy Reserves Group, Inc.* v. *Kansas*

The statute thus constitutes a severe and unexpected impairment of Trustees' pre-existing lease contracts.

2. As we have already shown, Chapter 516 does not "serve a legitimate public purpose." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 22 (1977). The structure and purposes of the statute overwhelmingly serve only certain private lessees in derogation of the interests of a political minority of lessors.[210]

3. The statute was not a temporary measure to deal with a "broad and desperate emergency" situation, such as the Great Depression (*cf. Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 444-445 (1934)), justifying retroactive application of the statute. *Allied Structural Steel Co.*, 438 U.S. 248-249.[211] The Act is a permanent measure, applicable to many long-outstanding leases, and unjustified by any exigent conditions.[212]

Power & Light Co., 103 S. Ct. 697, 705, 706-708 (1983); *Veix* v. *Sixth Ward Building & Loan Ass'n*, 310 U.S. 32, 38 (1940). While land reform bills had been introduced in the Hawaii Legislature prior to 1967, none had passed, and Trustees had no reason to expect that one would do so prior to the actual enactment of Act 307 in 1967.

[210] This is not a situation such as in *Exxon Corp.* v. *Eagerton*, 103 S. Ct. 2296, 2306 (1983), where the application of an oil and gas price pass-through prohibition was "incidental" to the primary purpose of protecting consumers from price increases. Chapter 516 was designed, like the pension law in *Allied Structural Steel Co.*, 438 U.S. at 247-249, directly to adjust the rights and liabilities of the contracting parties.

[211] While an emergency is no longer an essential justification, the lack of an emergency remains one of the factors to be assessed. *United States Trust Co.*, 431 U.S. at 24 n.19.

[212] Any contention that retroactive application was essential to stem a social emergency is belied both by the fact that the effective date of the statute's condemnation provisions was postponed for two years (1967 Haw. Sess. Laws, Act 307, § 46), and by the fact that these provisions lay dormant and unutilized for some years thereafter (1975 Haw. Sess. Laws, Act 186, § 1; HHA JS App. A152).

4. The statute is not "of a character appropriate to the public purpose [assertedly] justifying its adoption." *United States Trust Co.*, 431 U.S. at 22. The statute may be employed only by persons leasing lots in tracts of five acres or more, who meet the statutory qualifications, who are financially able and desirous of obtaining title, and who have initiated the "takings" proceedings. These limited takings will not change any "pattern of ownership." These lessees are, moreover, free to impose the same restraints after acquisition of fee title, by becoming landlords themselves and leasing long-term to others. And after transfer of fee title, existing regulatory measures will no longer bind the lots, leaving the lessees free to sell, rent, or lease the land at whatever prices, times, and manner they desire.

5. The means chosen are "without moderation or reason [and] in a spirit of oppression." *W.B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 60 (1935).[213] The legislature selected the drastic retroactive mechanism of "taking" pre-existing leases, rather than resort to its wholly prospective regulatory power to accomplish its alleged objectives.[214] Since no grace period or other ameliorative

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[213] *See also United States Trust Co.*, 431 U.S. at 28-31; *Allied Structural Steel Co.*, 438 U.S. at 250-251.

[214] Regulatory measures, limiting rents and lease terms, could have alleviated the state's economic concerns. Many such measures were in existence, and still others have been subsequently enacted (*see* note 182, *supra*). The state could also have made available some of its vast landholdings for fee simple residential use, or relaxed current state zoning limitations restricting the great bulk of land to agriculture or conservation uses (*see* notes 188-190, *supra*). The state similarly could have avoided impairment of existing lease contracts by condemning vacant lands for public use. Finally, the state could have made Chapter 516 prospective, as Maryland has consistently done in enacting laws permitting redemption of leases. *See Flook* v. *Hunting*, 76 Md. 178, 24 A. 670, 671 (1892); *Marburg* v. *Mercantile Building Co.*, 154 Md. 488, 140 A. at 839; *Trustees of Sheppard & Enoch Pratt Hospital* v. *Swift & Co.*, 178 Md. 200, 13 A.2d 174, 178 (1940). The existence of these less drastic alternatives is relevant to the Contract Clause issue. *United States Trust Co.*, 431 U.S. at 29-31.

provisions were incorporated, a lessor who leased a residential lot prior to enactment is unavoidably subjected to potential loss of his fee title, contrary to otherwise wholly reasonable expectations.[215]

CONCLUSION

No amount of legislative "findings" can disguise the fact that what is involved in this case is a naked taking of private property for private use. Unless the Public Use requirement is to be read out of the Constitution—which is clearly what appellants seek—the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[215] The taking power itself is also exercised in an arbitrary and oppressive manner. The statute now permits taking of only some of the lots within a designated development tract. *See* Haw. Rev. Stat. § 516-22, as amended by 1975 Haw. Sess. Laws, Act 184 § 2(6), to permit acquisition of "all or a portion of" a development tract. The resultant random "checkerboarding" in each tract will damage—in effect, "take"—property rights in the remaining lots in the tract. The lessor will incur increased administrative costs in administering the non-homogenous tract, and the non-acquiring lessees will be deprived of the benefits from the protective and custodial services which lessors customarily furnish.